Supreme Court
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No. _____

In the
Supreme Court of the United States
October Term, 1994

Richard Anderson; Robert Eggan; Carl Englehorn; Norris Nielsen; Timothy Wandersee; Donald Woods; Peter Lowry,

Plaintiffs - Appellants,

v.

Unisys Corporation, doing business as Remington Rand Univac, doing business as Sperry Univac, doing business as Sperry, doing business as Unisys, doing business as Paramax Systems,

Defendant - Appellee.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner seeks a writ of certiorari to review the decision of the Eighth Circuit Court of Appeals reversing the United States District Court for the District of Minnesota's entry of summary judgment for Petitioner. The following questions would be raised:

1. Does an accurate, but incomplete communication from a government official justify equitable tolling of the charge-filing deadline of the Age Discrimination in Employment Act ("ADEA"), when the defendant employer has committed no misconduct and has complied with the ADEA's notice provisions?

2. Does an incomplete communication from a State of Minnesota official justify equitable tolling of the charge-filing deadline of the federal ADEA statute, when the defendant employer has complied with the ADEA's provisions for notifying a charging party of his or her ADEA rights?

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

The parties to the proceeding below are those listed in the caption on the cover of this petition.

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 94-1363

Richard Anderson; Robert Eggan; Carl Englehorn; Norris Nielsen; Timothy Wandersee; Donald Woods; Peter Lowry,

Plaintiffs - Appellants,

v.

Unisys Corporation, doing business as Remington Rand Univac, doing business as Sperry Univac, doing business as Sperry, doing business as Unisys, doing business as Paramax Systems,

Defendant - Appellee.

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The Opinion of the United States District Court for the District of Minnesota granting Unisys Corporation's ("Unisys") motion to dismiss was issued on October 20, 1993. It is unreported and reprinted in the Appendix ("A") at A-47-60. The District Court's Opinion granting Unisys' motion for reconsideration was issued on December 28, 1993. It is unreported and reprinted in the A-23-46.

Plaintiffs-Appellants appealed to the Eighth Circuit Court of Appeals. A panel of the Court of Appeals issued a decision affirming the District Court's October 20, 1993 Order, but reversing the December 28, 1993 Order. The decision was issued on February 14, 1995, is reported at 47 F.3d 302 and reprinted at A-5-22. On April 19, 1995, the panel denied Plaintiffs-Appellants' motion for rehearing. The April 19, 1995 Order is unreported and reprinted at A-1-4.

JURISDICTION

The jurisdiction of this Court to review the judgment of the Eighth Circuit Court of Appeals is invoked under 28 U.S.C. § 1254(1), which provides for review "[b]y writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree." Under 28 U.S.C. § 2101(c), the writ must be "taken or applied for within ninety days after the entry of the judgment or decree." *See* Sup. Ct. R. 13.1. The 90 day period commences from the date of a denial of a petition for rehearing. In this case, Plaintiffs-Appellants' petition for rehearing was denied on April 19, 1995. The 90 day period would expire on July 19, 1995.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. Article VI, section 2:

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the Land; and the judges in every State shall be bound thereby, any thing in the Constitution or laws of any State to the contrary notwithstanding.

STATUTORY PROVISIONS INVOLVED

29 U.S.C. § 626(d):

No civil action may be commenced by an individual under this section until 60 days after a charge of discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed--

(1) within 180 days after the alleged unlawful practice occurred; or

(2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

29 U.S.C. § 633(b):

In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant and seek relief from such

discriminatory practice, no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated: Provided, that such sixty day period shall be extended to one hundred and twenty days during the first year after the effective date of such State law. If any requirement for the commencement of such proceedings is imposed by a State authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State authority.

Minn. Stat. § 363.03 subd. 1:

Except when based on a bona fide occupational qualification, it is an unfair employment practice . . . For an employer, because of race, color, creed, religion, national origin, sex, marital status, status with regard to public assistance, membership or activity in a local commission, disability, sexual orientation, or age,

(a) to refuse to hire or to maintain a system of employment which unreasonably excludes a person seeking employment; or

(b) to discharge an employee; or

(c) to discriminate against a person with respect to hiring, tenure, compensation, terms, upgrading, conditions, facilities, or privileges of employment.

STATEMENT OF THE CASE

This Petition seeks review of the Eighth Circuit Court of Appeals' decision that accurate, but incomplete, statements from an official at the Minnesota Department of Human Rights ("MDHR") suffice to equitably toll the federal ADEA's charge-filing deadline. The Eighth Circuit's decision alters the 300-day charge filing deadline of the ADEA based on a statement in an MDHR form letter sent to potential charging parties that the charge-filing period of Minnesota's state anti-discrimination statute was 365 days. The Eighth Circuit held that since the letter did not also include information regarding the ADEA charge-filing deadline, thus "mislead[ing]" a potential charging party, the federal deadline must be extended to match the state deadline. The Eighth Circuit's decision is in direct conflict with decisions of the Second, Third, Fifth and Tenth Circuit Courts of Appeals, all of whom have held that accurate, but incomplete, statements from a government official are not sufficient to equitably toll the ADEA's charge-filing deadline. Moreover, the Eighth Circuit's decision threatens the integrity of the statute of limitation of the ADEA in particular and federal statutes of limitations in general; any state official may alter a federal statute simply by stating that the federal statute is longer than the period chosen by Congress. Finally, this decision is of substantial practical importance. The Eighth Circuit has effectively altered the ADEA charge-filing deadline for all potential charging parties who received the form letter from the MDHR. This Court should review this decision so as to resolve the conflict in this area and protect the federal ADEA's charge-filing deadline.

I. BACKGROUND

This case arises from two sets of layoffs at Unisys' facility in Eagan, Minnesota in 1990. On April 2, 1990, Plaintiffs-Appellants Anderson, Eggan, Englehorn, Lowry, Nielsen and Wandersee were informed that they were to be laid off. A second layoff occurred approximately two and one-half months later. On June 18, 1990, Plaintiff-Appellant Woods was informed that he would be laid off.[1]

Plaintiffs-Appellants Eggan, Englehorn, Lowry, Woods and Wandersee all sought legal advice after their layoffs. Before they filed charges with the MDHR and the EEOC, they engaged Maurice O'Brien a plaintiff-side employment law specialist at Gordon, Miller & O'Brien. Attorney O'Brien advised Plaintiffs-Appellants in the charge-filing process.

More than 300 days passed before any Plaintiff-Appellant filed a charge of discrimination. Plaintiff-Appellant Anderson filed a charge of age-based discrimination on March 25, 1991, over 360 days after receiving his notice of layoff. Plaintiffs-Appellants Eggan, Englehorn, Lowry, and Wandersee filed charges, by and through legal counsel, on April 1, 1991, one year after receiving notice of their layoff. Plaintiff-Appellant Woods separately filed a charge, by and through legal counsel, on June 4, 1991, well over 300 days after he was notified of his

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[1] Numerous other layoffs have occurred in software engineering, most recently in 1994.

layoff. Plaintiff-Appellant Nielsen never filed a charge with either the EEOC or the MDHR.

Ruling separately in each case on requests to reconsider, the MDHR affirmed or reaffirmed its finding that there was no probable cause to support the claims. Plaintiffs-Appellants Eggan, Englehorn, Lowry, Woods and their counsel were notified in separate letters dated December 24, 1991 that no further action would be taken on the claims and that they had 45 days to begin litigation in accordance with Minnesota statutes. Plaintiff-Appellant Wandersee and his counsel received a similar notification on December 27, 1991. Plaintiff-Appellant Anderson was notified that no further action would be taken on his claim on December 26, 1991.

Plaintiffs-Appellants Anderson, Lowry, Eggan, Wandersee, Englehorn and Woods then met with Attorney O'Brien to discuss their options. Attorney O'Brien informed them that they could file a lawsuit in court, and explained that they had a forty-five day time limit for filing. Attorney O'Brien was willing to proceed to state or federal court, but Plaintiffs-Appellants Lowry, Eggan, Wandersee, Englehorn and Woods elected not to do so.

On February 10, 1992, Plaintiff-Appellant Anderson filed, but did not serve, a complaint in Federal Court alleging state and federal discrimination claims. No claims on behalf of other employees were asserted in that complaint, which was not designated as a "class" complaint. On June 9, 1992 -- 119 days after this filing -- an amended complaint was served in which Plaintiff-Appellant Anderson first purported to represent a class of similarly situated employees. On March 25, 1993, the Court denied Plaintiff-Appellant

Anderson's motion for class certification, but allowed members of the putative class to join the action. A-25. Six such "putative plaintiffs" elected to do so.

II. DISTRICT COURT'S DECISIONS

A. Motion to Dismiss.

On October 20, 1993, the District Court held that the claims of Plaintiffs-Appellants Eggan, Englehorn, Lowry, Wandersee and Woods, and the state law claims of Anderson and Nielsen, were untimely. The Court first held that Eggan, Englehorn, Lowry, Wandersee and Woods "received [ADEA] right to sue letters and deliberately decided not to file lawsuits after receiving legal advice." A-56. The Court explained that it could "only conclude that [Plaintiffs-Appellants] made a deliberate and counseled decision not to proceed and to allow the statute of limitations to run." A-57. As a result, it dismissed their claims.

The Court then addressed Anderson and Nielsen's state law claims. The Court noted that although Anderson filed his Complaint in timely fashion, he did not serve that Complaint upon Unisys until after the statute of limitations had expired on his state law claims. A-57. The Court acknowledged that state law governs for purposes of determining how and when an action must be commenced, and noted that the Minnesota Rules of Civil Procedure explicitly state that service, not filing, commences an action. A-57-58. The Court therefore held that the state law claims of Anderson and Nielsen were barred by the applicable statute of limitations. A-58.

B. Motion for Summary Judgment.

Unisys first moved for summary judgment on Anderson and Nielsen's ADEA claims based on evidence that an ADEA notice was posted in the human resources area of the building next to that used by Anderson and Nielsen. The Court denied this motion for summary judgment, but the Court's questions at oral argument led Unisys to interview its security guards, and discover additional evidence that a posting was also present in the lobby of the building used by Andersen and Nielsen. Unisys moved the Court to reconsider its denial of summary judgment based on this evidence, after plaintiffs were given an opportunity to thoroughly cross-examine the guards.

The Court granted Unisys' motion on December 28, 1993. The Court first rejected Appellants' request that it ignore the new evidence, holding that both parties had acted in good faith during the discovery process, and that Plaintiff-Appellants had the opportunity to depose the new witnesses and probe into the sources of the witnesses' knowledge, thus eliminating any prejudice which might result from consideration of the evidence. A-43-44. As a result, the Court examined the evidence and concluded that "it is clear that plaintiffs will not be able to prove that defendant failed to comply with statutory notice requirements." A-44. The Court therefore granted Unisys' motion. A-46.

III. COURT OF APPEALS' OPINION

The Eighth Circuit Court of Appeals affirmed the District Court's October 20, 1993 Order dismissing Plaintiff-Appellants' state law claims and the ADEA claims of

Plaintiff-Appellants Eggan, Englehorn, Lowry, Wandersee and Woods. The Court of Appeals also, however, reversed the December 28, 1995 ruling and held that the ADEA claims of Plaintiff-Appellants Andersen and Nielsen were not barred by their failure to file timely charges of discrimination.

The Court of Appeals first reversed the District Court's December 28, 1993 Order and held that the ADEA claims of Plaintiff-Appellants Andersen and Nielsen were not barred by their failure to file timely charges of discrimination. The Court of Appeals based its decision on a form letter sent to Plaintiff-Appellant Andersen by the MDHR:

> Anderson first contacted the MDHR about the possibility of filing an administrative charge in the fall of 1990. The first letter he received from the MDHR stated that he had one year from the date of the discriminatory action to file an administrative discrimination charge with the MDHR and that if the "charge alleges a violation of the federal laws . . . the Department will also file it with the (EEOC) . . . " The form made no mention of the fact that the administrative filing deadline with the EEOC was 300 days rather than one year. Anderson claims this letter led him to believe that the federal and state deadlines were the same, one year from the date of the discriminatory action.

A-12 (ellipses and parentheses in original). The Court of Appeals noted that the MDHR's form letter was accurate and contained no misrepresentations, A-15, but nevertheless held

that the letter justified equitable tolling of the ADEA's charge-filing deadline. A-16. The Court rejected Unisys's contention that accurate, but incomplete, communications from a government official were insufficient to toll the ADEA's charge-filing deadline:

> Unisys urges that Anderson cannot rely on the letter from the MDHR as a basis for equitably tolling the administrative filing period because the letter does not contain any misinformation or misrepresentations, but merely fails to include all relevant information. We disagree. In *Warren* [*v. Department of the Army*, 867 F.2d 1156, 1160-61 (8th Cir. 1989)], a federal employee brought suit against the wrong defendant because a letter from the EEOC did not make clear the correct party to be sued. As in this case, the letter did not make any affirmative misrepresentations, but rather used ambiguous and misleading language. We are convinced that the letter Anderson received from the MDHR, like the letter Warren received from the EEOC, would easily mislead a claimant unassisted by counsel.

A-15. The Court then held, as a matter of law, that "we find the letter sufficient to equitably toll the federal limitations period in this case." A-16.

The Court of Appeals then held that the District Court properly dismissed the federal claims of Plaintiff-Appellants Eggan, Englehorn, Lowry, Wandersee and Woods, because these individuals had made an affirmative decision, while

advised by counsel, not to bring a lawsuit against Unisys. A-19-20. The Court reasoned:

> Those plaintiffs who do file administrative charges, however, should be bound by the statute of limitations, which is normally stated in the right-to-sue letter. Even if those plaintiffs are piggybacking on another employee's timely administrative charge, once they file separate administrative charges, they cannot rely any further on the other claimant's actions and must timely file suit after receiving their right-to-sue letters. Thus, any claimant who files an administrative charge and receives a right-to-sue letter from the EEOC must file suit within ninety days after receiving that letter to preserve the cause of action.

A-20. The Court also affirmed the dismissal of the state law claims of Plaintiffs-Appellants Andersen and Nielsen because they failed to commence those claims until after the state statutes of limitations had run. A-21.

The Court therefore affirmed the dismissal of the claims of Plaintiffs-Appellants Eggan, Englehorn, Lowry, Wandersee and Woods, as well as the dismissal of the state law claims of Plaintiffs-Appellants Anderson and Nielsen, reversed the entry of summary judgment on the ADEA claims of Plaintiffs-Appellants Anderson and Nielsen, and remanded the case to the District Court with the instruction to "equitably toll the federal administrative filing period as [Plaintiff-Appellants Anderson and Nielson]." A-21

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD RESOLVE THE CONFLICT BETWEEN THE CIRCUIT COURTS OF APPEALS AS TO WHETHER AN ACCURATE BUT INCOMPLETE COMMUNICATION FROM A GOVERNMENT OFFICIAL MAY EQUITABLY TOLL THE ADEA CHARGE-FILING DEADLINE.

Five United States Courts of Appeals have addressed the issue of whether and under what circumstances a communication from a government official may justify an equitable tolling of the ADEA's charge-filing deadline. With the exception of the Eighth Circuit Court of Appeals, the Circuit Courts have unanimously held that an accurate, but incomplete, communication from a government official did not justify such equitable tolling. The Eighth Circuit has created a conflict which this Court should resolve.

The Eighth Circuit Court of Appeals unambiguously held in the instant case that an accurate, but incomplete, communication from a government official may justify equitable tolling of the ADEA's charge filing deadline. A-14-16. The Court explained its holding as follows:

> In *Warren* [*v. Department of the Army*, 867 F.2d 1156, 1160-61 (8th Cir. 1989)], a federal employee brought suit against the wrong defendant because a letter from the EEOC did not make clear the correct party to be sued. As in this case, the letter did not make any affirmative misrepresentations, but rather used ambiguous and misleading language. We are

> convinced that the letter Anderson received from the MDHR, like the letter Warren received from the EEOC, would easily mislead a claimant unassisted by counsel.

A-15. The Court therefore held that the letter equitably tolled the ADEA's charge filing deadline. A-16. This holding (and the Eighth Circuit's previous holding in *Warren*) are in direct conflict with the decisions of the Second, Third, Fifth and Tenth Circuit Courts of Appeals.

The Second Circuit Court of Appeals has held that accurate but incomplete or ambiguous statements from a government official do not justify equitable tolling. *See Vernon v. Cassadaga Valley Central School District*, 1995 U.S. App. LEXIS 4714 *14-15 (2nd Cir.); *Long v. Frank*, 22 F.3d 54, 58-59 (2nd Cir. 1994). In *Vernon*, the Second Circuit rejected the plaintiffs' equitable tolling argument because although an EEOC right to sue letter sent to the plaintiffs was "not a model of clarity," it "was clearer than that sent in *Long*, was correct in its content, and surely did not amount to affirmative misconduct." 1995 U.S. App. LEXIS at * 15. This conclusion is consistent with the Second Circuit's previous decision to reject equitable tolling in *Long* because "[t]he ambiguity of the EEOC notice does not, however, amount to affirmative misconduct" necessary to equitably toll the ADEA's charge-filing deadline. 22 F.3d at 59.

The Third Circuit Court of Appeals has also addressed accurate but incomplete or ambiguous statements from a government official, and has held that such statements do not justify equitable tolling. *See Williams v. Army and Air Force*

Exchange Service, 830 F.2d 27, 30-31 (3rd Cir. 1987); *Kocian v. Getty Refining & Marketing Co.*, 707 F.2d 748, 754 (3rd Cir.), *cert. denied*, 464 U.S. 852 (1983). In *Williams*, the Third Circuit held that a government official's provision of incomplete information is insufficient to justify tolling:

> Williams argues that the government officials actively mislead her attorney concerning the proper defendant. According to the affidavit of her counsel, AAFES personnel told counsel that AAFES was an unincorporated, nonappropriated funds activity and that service should be made on the U.S. Attorney General and the local U.S. Attorney . . . Although these statements to plaintiff's counsel may have led him to believe that naming AAFES as the defendant would have been proper, they were correct and the government engaged in no misrepresentation.

830 F.2d at 31. This conclusion is consistent with the Third Circuit's prior conclusion in *Kocian* that the EEOC's provision of accurate, but incomplete, information is insufficient to justify tolling. 707 F.2d at 755.

The Tenth and Fifth Circuit Courts of Appeals have concurred with the Second and Third Circuits' rejection of equitable tolling based upon accurate, but incomplete, statements of government officials. *See Mascheroni v. Board of Regents of the University of California*, 28 F.3d 1554, 1562-63 (10th Cir. 1994); *Conaway v. Control Data Corp.*, 955 F.2d 358 (5th Cir. 1992). In *Mascheroni*, the Tenth

Circuit Court of Appeals rejected a Title VII equitable tolling claim, stating that:

> We have explained that the time limits in Title VII "will be tolled *only* if there has been 'active deception' of the claimant regarding procedural prerequisites." *Sheerer v. Rose State College*, 950 F.2d 661, 665 (10th Cir. 1991), *cert. denied*, --- U.S. ---, 112 S. Ct. 2995, 120 L.Ed.2d 872 (1992) . . .

28 F.3d at 1562 (emphasis in original) (citation omitted). The Tenth Circuit concluded that the plaintiff failed to demonstrate the requisite active deception necessary to establish equitable tolling. The Fifth Circuit Court of Appeals reached a similar conclusion in *Conaway*:

> [Conaway] argues, however, that he was misled when, according to him, the EEOC failed to tell him that he had to file the complaint with the EEOC within 300 days of the discrimination; if he had been told this, he would have filed a complaint that month. He contends, therefore, that because the EEOC misled him, the time limitation should be equitably tolled. This Circuit has not addressed the issue of whether an accurate, but incomplete, oral statement by the EEOC can be the basis for equitable tolling . . . we hold that the alleged incomplete oral statements made by the EEOC to Conaway during a telephone conversation will not support equitable tolling.

955 F.2d at 363. The Fifth Circuit thus refused to equitably toll the charge-filing deadline.

All of these decisions are directly contrary to the Eighth Circuit Court of Appeals' decisions in *Warren* and the instant case. The Eighth Circuit Court of Appeals concluded in *Warren* that a government official's accurate but incomplete or ambiguous statements were sufficient to establish equitable tolling. Since the Eighth Circuit's decision in *Warren*, the Second, Fifth and Tenth Circuit Court of Appeals all held that such statements are not sufficient to toll the charge-filing deadline (the Third Circuit Court of Appeals had already reached that conclusion). The Eighth Circuit nevertheless has refused to alter its position and maintains that such statements may toll the charge-filing deadline. This Court should grant Certiorari to resolve this conflict.

The conflict between these positions is particularly important because it will impact upon a tremendous number of lawsuits. The Eighth Circuit Court of Appeals held, as a matter of law, that an MDHR form letter which contained only the Minnesota charge-filing deadline, but not the federal deadline, was sufficiently "ambiguous" and "misleading" so as to justify equitable tolling of the ADEA's charge-filing deadline. The MDHR sent out thousands of such letters to potential charging parties, all of whom now have (under the Eighth Circuit's analysis) a 365 day charge-filing deadline

under the ADEA.[2] Moreover, the MDHR (and many other federal and state agencies in Minnesota and elsewhere) send numerous other communications, both written and verbal, to charging parties. All of these communications, under the Eighth Circuit's reasoning, must be "unambiguous" and "complete" or the ADEA's charge-filing deadline will be equitably tolled. This decision will thus have a substantial impact upon a large number of employers and employees, as well as upon a variety of federal, state and local agencies.

In fact, the Eighth Circuit Court of Appeals' holding should apply with equal force outside of the ADEA context. Employment statutes with similar statute of limitations schemes, such as Title VII of the Civil Rights Act of 1964, and other federal statutes which have analogous state statutes, may now be altered by any communication from a state or federal official that is arguably "ambiguous" or "incomplete." This conclusion threatens the integrity of all such statutes of limitations and impacts upon a wide swathe of plaintiffs and defendants as well as federal, state and local officials.

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[2] This aspect of the Court's ruling is particularly significant because the Court did not cite, and Plaintiffs-Appellants did not provide, any evidence that Plaintiffs-Appellants actually relied upon the Minnesota Department of Human Rights' letter. *See* A-12. In effect, the Court held as a matter of law that all recipients of the letter may establish equitable tolling regardless of whether they actually relied upon the statements contained therein in not filing a charge of discrimination.

II. THIS COURT SHOULD SETTLE THE ISSUE OF WHETHER A REPRESENTATION OF A STATE OFFICIAL CAN TOLL THE FEDERAL ADEA CHARGE-FILING DEADLINE DESPITE THE EMPLOYER'S COMPLIANCE WITH FEDERALLY IMPOSED NOTICE PROVISIONS.

The Eighth Circuit Court of Appeals specifically held that a representation of a state official may justify tolling of a federally imposed statute of limitations, even though the defendant-employer, Unisys, had complied with the ADEA's notice-posting requirements. The Eighth Circuit's decision effectively allows a state official to alter the statute of limitations of a federal statute by sending out a form letter to potential charging parties. This decision threatens the integrity of federal statutes of limitations, which may now be changed by a state official who makes an incomplete, ambiguous or inaccurate statement regarding the federal statute of limitations.

The Eighth Circuit even acknowledged this difficulty in noting that "most of the cases cited involve misleading correspondence or information from the EEOC, and the letter in this case came from the MDHR . . ." A-14. The Court concluded, however, that "we do not find that a meaningful distinction," A-14, because the EEOC and MDHR have a "worksharing agreement" that provides that the EEOC and MDHR "each designate the other as its agent for the purpose of receiving and drafting charges." A-14.

The Eighth Circuit has allowed the MDHR, a state agency, to alter a statute of limitations adopted by the United States Congress to match Minnesota's state statute of

limitations by sending a form letter to prospective charging parties. This Court has specifically warned against allowing states to alter the statutes of limitations specified by Congress in the ADEA:

> The ADEA's limitations periods are set forth in explicit terms in 29 U.S.C. § 626(d) and (e), not § 14(b) . . . We will not attribute to Congress an intent through Section 14(b) to add to these explicit requirements by implication and to incorporate by reference into the ADEA the various state age discrimination statutes of limitations. *Cf. Occidental Life Ins. Co v. EEOC*, 432 U.S. 355, 371, 53 L. Ed.2d 402, 97 S. Ct. 2447 (1977). Congress could not have intended to consign federal lawsuits to the "vagaries of diverse state limitations statutes," *ibid.*, particularly since, in many States, including Iowa, the limitations periods are considerably shorter than the 180-day period allowed grievants in nondeferral States by 29 U.S.C. § 626(d)(1).

Oscar Mayer & Co. v. Evans, 441 U.S. 750, 762-63, 99 S. Ct. 2066, 60 L. Ed.2d 609, 619-20 (1979) (footnotes omitted). This Court and Congress have both sought to protect the ADEA's statute of limitations from state interference. *Id.*; *Occidental Life Ins*, 432 U.S. at 371. The Eighth Circuit Court of Appeals' decision allows precisely the type of interference previously prohibited by Congress and this Court.

The Eighth Circuit's decision creates a particularly destructive type of interference. The Eighth Circuit allows the ADEA's statute of limitations to be altered not by the legislature of the State of Minnesota, but by the MDHR. Congress and this Court have prohibited a state legislature from altering the ADEA's statute of limitations. *Oscar Mayer*, 441 U.S. at 762-63. An official at a Minnesota agency should not be permitted to do what the state legislature does not have the power to accomplish.

This interference is also problematic because a defendant-employer, such as Unisys, may comply with all applicable federal requirements in notifying its employees of their rights under the ADEA, only to see a state official later alter the ADEA's statute of limitations. In this case Unisys complied with all such requirements, but is nevertheless subject to an extended statute of limitations as a result of a state official's communication with a prospective charging party.

Contrary to the contention of the Eighth Circuit Court of Appeals in this case, the worksharing agreement between the EEOC and the MDHR does not alleviate these problems. The EEOC cannot itself alter the ADEA's statute of limitations, and certainly cannot delegate "authority" to to make such alterations to a state agency such as the MDHR. Moreover, the fact that the EEOC and the MDHR have negotiated a worksharing agreement does not prevent the ADEA and other federal civil rights statutes from being subject to the "vagaries of diverse state limitations statutes" previously condemned by this Court in *Oscar Mayer* and *Occidental Life*. Finally, the worksharing agreement will not lessen or limit the impact of this decision; such worksharing

agreements have been negotiated by the EEOC and a state agency in nearly every state. This decision may therefore have an impact in a wide variety of different states.

The Eighth Circuit Court of Appeals' decision allows a state official to alter a federal statute of limitations by sending a form letter to prospective plaintiffs. This decision allows the sort of state interference with federal statutes of limitations that Congress sought to avoid, and that this Court condemned in *Oscar Mayer* and *Occidental Life*. The decision poses grave dangers to the integrity of the statute of limitations of the ADEA in particular and federal civil rights statutes in general.

CONCLUSION

The theoretical implications and the practical impact of the Eighth Circuit Court of Appeals' decision both warrant review by this Court. The Eighth Circuit's decision is in direct conflict with decisions of the Second, Third, Fifth and Tenth Circuit Courts of Appeals, all of whom have held that accurate, but incomplete statements from a government official are not sufficient to equitably toll the ADEA's charge-filing deadline. The practical impact of the Eighth Circuit's decision will be instant and severe. The decision effectively alters the charge-filing deadline under the ADEA for all potential charging parties who received this form letter, or any similar letter, from the MDHR or any similar state or federal agency. The same reasoning should apply to all other federal statutes that have a state counterpart. This decision will impact upon a large number of employees, employers, plaintiffs, defendants and federal, state and local officials and agencies. The theoretical implications of the

Eighth Circuit's decision are even more significant: the decision allows a state official to alter a federal statute of limitations by merely sending a form letter to potential plaintiffs.

Accordingly, Unisys respectfully requests the Supreme Court issue a Writ of Certiorari to review the critical statutory and Constitutional issues raised by this case. Ultimately, Unisys seeks reversal of the Eighth Circuit Court of Appeals with an order dismissing the ADEA claims of Plaintiff-Appellants Anderson and Nielsen on the grounds that they did not file those claims within the charge-filing deadline prescribed by the ADEA.

Respectfully submitted this 18th day of July, 1995.

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UNITED STATES COURT OF APPEALS
For The Eighth Circuit

No. 94-1363

Richard Anderson, Robert Eggan; Carl Englehorn; Norris Nielsen; Timothy Wandersee; Donald Woods, Peter Lowry,	)	
Plaintiffs - Appellants,	)	
v.	)	Order Denying Petition for Rehearing
Unisys Corporation, doing business as Remington Rand Univac, doing business as Sperry Univac, doing business as Sperry, doing business as Unisys, doing business as Paramax Systems,	)	
Defendants - Appellee.	)	

Filed: April 19, 1995

Before McMILLIAN, Circuit Judge, LAY, Senior Circuit Judge, and BOWMAN, Circuit Judge.

Appellants have petitioned for a rehearing of that portion of this Court's opinion filed February 14, 1995, that affirmed the dismissal of Appellants Robert Eggan, Carl Englehorn, Timothy Wandersee, Donald Woods, and Peter Lowry from this action. Specifically, Appellants claim this Court erred in finding they waived their argument that the statute of limitations contained in the Civil Rights Act of 1991, which became effective November 21, 1991, did not apply to this case. Appellants also claim this Court erred in finding the first complaint filed in this action was never served upon Unisys.

Unisys's Memorandum in Support of its Motion to Dismiss, filed with the district court on July 28, 1993, is replete with references to the 90-day limitations period from the Civil Rights Act of 1991. Nevertheless, Appellants' Memorandum in Opposition to that motion, filed August 16, 1993, never indicated that any other limitations period should apply. On that basis, the district court found that "[t]he parties agree that the Civil Rights Act of 1991 applies to this case." Anderson v. Unisys, No. CV 4-92-138, slip op. at 6 n.2 (October 20, 1993). Appellants' petition for rehearing points out that they raised the issue and argued the Civil Rights Act of 1991 did not apply in their Motion for Reconsideration of the order granting the Motion to Dismiss, filed with the district court on November 3, 1993. The district court summarily denied that motion on November 24, 1993, without ruling on the issues raised therein.[1] Thus,

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[1] Appellants urge that the district court's order denying the motion for reconsideration considered the merits of that motion. We must disagree. The court let stand its original

order reflecting that the parties had agreed that the Civil Rights Act of 1991 was applicable.

Moreover, even on its merits, Appellants' argument that the Civil Rights Act of 1991 is inapplicable would fail. The Act became effective on November 21, 1991, and this action was not filed until well after that date. Thus, it is difficult to find the application of the new provisions to this case "retroactive." District courts that have considered this issue have found that the new statute of limitations applies to claims accrued, but not filed, before the date the statute was enacted. See, e.g., Smith v. Zeneca, Inc., 820 F. Supp. 831, 832-34 (D. Del. 1993) (holding new statute of limitations applies to action filed after effective date of Act), aff'd mem., 37 F.3d 1489 (3d Cir. 1994); Jones v. Frank, 819 F. Supp. 923, 925 (D. Colo. 1993) (applying old statute of limitations because action filed before enactment date), aff'd on other grounds, 32 F.3d 1454 (10th Cir. 1994); McConnell v. Thompson Newspapers, Inc., 802 F. Supp. 1484, 1495-96 (E.D. Tex. 1992) (applying new statute of limitations to cause of action filed after date Act effective). In addition, even if the application of the new provisions to this case may be considered retroactive, this Court has previously held that the ADEA statute of limitations is "intended to serve as a conventional limitation on the remedy, not upon the right to bring the action." Mumbower v. Callicott, 526 F.2d 1183, 1187 n.5 (8th Cir. 1975). Thus, we consider the limitations period a procedural rather than a substantive requirement, and have found that "courts apply the procedure in effect when the case is before them." United States v. Higgins, 987 F.2d 543, 546 (8th Cir. 1993).

because the district court never passed upon this issue, we decline to consider it here. See Daisy Mfg. Co. v. N.C.R. Corp., 29 F.3d 389, 395 (8th Cir. 1994) ("Ordinarily, we do not decide issues that the district court did not adjudicate."); North Dakota v. Merchants Nat'l Bank & Trust Co., 579 F.2d 1112, 1115 (8th Cir. 1978) ("Generally we do not decide issues that were not passed upon by the trial court."); Highlands Ins. Co. v. Lewis Rail Serv. Co., 10 F.3d 1247, 1250-51 (7th Cir. 1993) (finding appellant had waived argument by failing to raise it until its motion for reconsideration of district court's entry of summary judgment); Burnette v. Dresser Indus., Inc., 849 F.2d 1277, 1285 (10th Cir. 1988) (declining to consider on appeal argument raised in a motion for reconsideration but "not considered or ruled upon by the district court").

Appellants also claim this Court erred in finding the first complaint filed in this action was never served upon Unisys. Two of the district court's orders specifically state that the first complaint was never served on Unisys. See Anderson v. Unisys, No. CV 4-92-138, slip op. at 2 (December 30, 1993) ("That original complaint was never served upon defendant."). Anderson v. Unisys, No. CV 4-92-138, slip op. at 3 (October 20, 1993) (same). Appellants never brought this alleged error to the attention of the district court, nor did they argue to this Court that this factual finding of the district court was in error. In any event, even if the first complaint was served on Unisys, that fact would not change the analysis in our original opinion.

For the foregoing reasons, the petition for rehearing is denied.

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 94-1363

Richard Anderson; Robert Eggan; Carl Englehorn; Norris Nielsen; Timothy Wandersee; Donald Woods; Peter Lowry,	*	
Plaintiffs - Appellants,	*	
v.	*	Appeal from the United States District Court for the District of Minnesota
Unisys Corporation, doing business as Remington Rand Univac, doing business as Sperry Univac, doing business as Sperry, doing business as Unisys, doing business as Paramax Systems,	*	
Defendant - Appellee.	*	

Submitted: October 13, 1994

Filed: February 14, 1995

Before McMILLIAN, Circuit Judge, LAY, Senior Circuit Judge, and BOWMAN, Circuit Judge.

LAY, Senior Circuit Judge.

Richard Anderson commenced this action against Unisys Corporation ("Unisys") for age discrimination under the Age Discrimination in Employment Act ("ADEA") and state anti-discrimination statutes. Several other former Unisys employees later joined the suit. The district court dismissed the state and federal claims of all the plaintiffs, except Anderson and Nielsen, for failure to comply with the statute of limitations. It then dismissed Anderson and Nielsen's state claims. Finally, it granted Unisys's motion for summary judgment on the federal claims of Anderson and Nielsen, finding they had failed to timely file an administrative charge and that there was no basis on which to equitably toll the filing deadline. We reverse in part, affirm in part, and remand for further proceedings.

BACKGROUND

Unisys laid off Anderson[1] and several other employees in the company's Software Engineering Division on April 2,

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[1] Unisys has rehired Anderson, but he nevertheless continues to pursue this action.

1990.[2] Anderson, who was forty-nine years old when he was laid off, filed administrative age discrimination charges with the Minnesota Department of Human Rights ("MDHR") and the Equal Employment Opportunity Commission ("EEOC") on March 25, 1991.[3] Nielsen never filed a charge with the MDHR or the EEOC. The other discharged employees

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[2] The other employees who eventually filed suit were Robert Eggan, Carl Englehorn, Peter Lowry, Norris Nielsen, Timothy Wandersee, and Donald Woods. Unisys notified all the plaintiffs that they were terminated on April 2, 1990, with the exception of Woods, who was informed of his termination on June 18, 1990.

[3] To bring an age discrimination suit under either the ADEA or Minnesota state law, plaintiffs are required to file administrative charges of age discrimination within certain time limits. The MDHR's administrative filing deadline is one year from the date of the allegedly discriminatory action. Minn. Stat. § 363.06 (1994). Minnesota is a deferral state under the ADEA; therefore, age discrimination claims filed with the MDHR are deemed to have been filed with the EEOC at the same time. 29 U.S.C. § 633(b) (1988). The EEOC's administrative filing deadline is 300 days, however, rather than one year. 29 U.S.C. § 626(d) (2) (1988). Anderson was terminated on April 2, 1990 and filed his administrative charge with the MDHR on March 25, 1991. Thus, he satisfied the one-year state administrative filing deadline, but missed the 300-day federal deadline.

retained counsel and also eventually filed charges with the MDHR.[4]

Anderson filed a pro se complaint in federal district court on February 10, 1992.[5] This complaint was never

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[4] The district court found that Eggan, Englehorn, Lowry, Wandersee, and Woods all filed administrative charges with the MDHR on April 1, 1991. See Anderson v. Unisys, No. CV 4-92-138, slip op. at 4 (October 20, 1993). On that basis, the court found that all these plaintiffs had missed the 300-day EEOC filing deadline except Woods, because Woods was notified of his termination on June 18, 1990. Woods's administrative charge is included in the record, however, and is dated May 29, 1991. Thus, it appears that, like Anderson, all of these plaintiffs, including Woods, met the one year state administrative filing deadline, but missed the 300-day federal deadline.

[5] Once the administrative process is complete, both the MDHR and the EEOC issue right-to-sue letters to potential plaintiffs; to preserve their claims, those individuals must then bring suit within a certain number of days after receiving the right-to-sue letters. The state statute of limitations for age discrimination claims is 45 days after receipt of a right-to-sue letter from the MDHR. Minn. Stat. § 363.14 (1994). The federal statute of limitations for ADEA claims is 90 days after the charging party receives a right-to-sue letter from the EEOC. 29 U.S.C. § 626(e) (Supp. 1993). Although the record is somewhat confusing, the parties appear to agree that Anderson filed his federal claim within 90 days after receipt of his right-to-sue letter from the EEOC and satisfied the

served on Unisys. All other plaintiffs, with the exception of Nielsen, consulted an attorney and decided not to pursue an action against Unisys, allowing the statute of limitations to run on their federal and state claims.

On June 9, 1992, with the assistance of counsel, Anderson filed an amended complaint that was served on Unisys. In his second complaint, he alleged that the other employees also had been terminated in violation of the ADEA and state law. He sought certification as a class action under 29 U.S.C. § 216(b) (1988).[6]

On March 25, 1993, the district court ruled that class certification was not warranted, but stated it would permit the other plaintiffs to join as individual parties.[7] The court also addressed Unisys's argument that Anderson's ADEA action was barred for failure to file a timely administrative charge with the EEOC. Anderson claimed that the administrative filing period should be equitably tolled because he had been

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federal statute of limitations.

[6] Certification of ADEA class actions is governed by 29 U.S.C. § 216(b) rather than Fed. R. Civ. P. 23.

[7] Apparently the district court, at that time, was unaware that all of the claimants except Nielsen had received right-to-sue letters following the rejection of their individual administrative filings, and failed to file timely suits. The record before us does not include Anderson's amended complaints which added these plaintiffs, but the briefs indicate those complaints were filed in June and July of 1993.

misled by Unisys and the MDHR, or in the alternative, because Unisys had failed to post a notice of employees' rights under the ADEA in an accessible location as required by law.[8]

In August 1993, Unisys filed a motion to dismiss all plaintiffs, except Anderson and Nielsen, because they had received right-to-sue letters from the EEOC and MDHR, but failed to file suit within the federal and state statutes of limitations after consulting an attorney and making a deliberate decision not to sue. The court granted the motion and dismissed their claims. The court also dismissed the state claims of Anderson and Nielsen for failure to commence suit within the time allowed under the state statutes of limitations.

These rulings left only Anderson and Nielsen's federal claims viable. The district court initially denied Unisys's motion for summary judgment on those claims, finding a genuine issue of material fact as to whether the administrative filing period should be equitably tolled because Unisys had failed to adequately post notice of employee rights under the

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[8] Although all the plaintiffs failed to file timely administrative charges with the EEOC, the district court found that the plaintiffs seeking to join Anderson's suit could "piggyback" on Anderson's administrative filing, provided he could show he was entitled to equitably toll the administrative filing period. See Kloos v. Carter-Day Co., 799 F.2d 397 (8th Cir. 1986); Allen v. Amalgamated Transit Union, 554 F.2d 876, 882-83 (8th Cir.), cert. denied, 434 U.S. 891 (1977). This proposition is not challenged here.

ADEA. On December 1, 1993, however, Unisys asked the court to reconsider its denial of summary judgment based on newly discovered evidence that it had posted notice of employees' rights under the ADEA in the very building where Anderson worked.[9] In late December 1993, the court granted Unisys's motion for reconsideration based on that evidence and entered summary judgment in its favor. Anderson and his fellow plaintiffs appeal the dismissal of the federal claims of all plaintiffs except Anderson and Nielsen, the dismissal of all state claims, and the adverse entry of summary judgment on the remaining federal claims.

TIMELINESS OF ANDERSON'S ADEA CLAIM

It is undisputed that Anderson failed to file a charge with the EEOC 300 days after April 2, 1990, the date he was notified of his discharge. The administrative deadline is not a jurisdictional limitation, however, but operates in the nature of a statute of limitations and is subject to equitable tolling and estoppel. See Zipes v. Trans World Airlines, 455 U.S. 385, 393 (1982) (holding that administrative filing period under Title VII is subject to waiver, estoppel, and equitable tolling); Heideman v. P.F.L., Inc., 904 F.2d 1262, 1265 (8th Cir. 1990) (holding administrative filing period under ADEA subject to equitable tolling), cert. denied, 498 U.S. 1026 (1991); DeBrunner v. Midway Equip. Co., 803 F.2d 950, 952 (8th Cir. 1986) (finding ADEA filing requirement subject to

[9] This evidence consisted of the affidavits of four security guards who worked at Unisys and claimed that the notices were conspicuously posted in the building where Anderson worked.

equitable tolling). Anderson offers several alternative arguments for tolling the 300-day EEOC administrative filing period. Because we find his claim that the letter he received from the MDHR was misleading sufficient to justify equitably tolling the filing period, we need not address the remainder of his arguments.

Anderson first contacted the MDHR about the possibility of filing an administrative charge in the fall of 1990. The first letter he received from the MDHR stated that he had one year from the date of the discriminatory action to file an administrative discrimination charge with the MDHR and that if the "charge alleges a violation of the federal laws . . .the Department will also file it with the [EEOC] . . . ." The form made no mention of the fact that the administrative filing deadline with the EEOC was 300 days rather than one year. Anderson claims this letter led him to believe that the federal and state deadlines were the same, one year from the date of the discriminatory action.

The district court found that representations made by the MDHR are insufficient as a matter of law to equitably toll the administrative filing period because this Court has previously held that "[e]quitable tolling arises upon some positive misconduct by the party against whom it is asserted."[10] Heideman, 904 F.2d at 1266 (quoting DeBrunner,

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[10] Based on this language in previous opinions in this circuit, the district court found that "equitable tolling is only appropriate if the failure to file a timely charge is attributable to conduct of the defendant." Anderson v. Unisys, No. CV 4-92-138, slip op. at 9 (March 25, 1993).

803 F.2d at 952) (emphasis added); Kriegesmann v. Barry-Wehmiller Co., 739 F.2d 357, 359 (8th Cir.), cert. denied, 469 U.S. 1036 (1984); see also Miller v. Runyon, 32 F.3d 386, 390 (8th Cir. 1994) (implying that only employer misconduct justifies equitable tolling). We feel the district court's reliance on this language, although understandable, fails to read this statement in the limited context of the facts presented. In each of the cases using that language, the plaintiff claimed the employer had failed to post information about employees' rights under civil rights statutes. Equitable tolling is permissible in other situations as well. In Baldwin County Welcome Center v. Brown, 466 U.S. 147, 151 (1984), the Supreme Court outlined several circumstances that may justify equitable tolling of a limitations period. These include cases:

> in which a claimant has received inadequate notice . . . ; or where a motion for appointment of counsel is pending . . . ; or where the court has led the plaintiff to believe that she had done everything required of her . . . . [or] where affirmative misconduct on the part of a defendant lulled the plaintiff into inaction.

Id. (citations omitted).

It is clear that equitable tolling is premised on the plaintiff's excusable neglect, which may or may not be

attributable to the defendant.[11] Other circuits, as well as our own, have held that when an administrative agency misleads a complainant, particularly one who is without the benefit of counsel, equitable tolling may be justified.[12] See, e.g.,

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[11] See Rhodes v. Guiberson Oil Tools Div., 927 F.2d 876, 878 (5th Cir.) ("Equitable tolling focuses on the plaintiff's excusable ignorance of the employer's discriminatory act. Equitable estoppel, in contrast, examines the defendant's conduct and the extent to which the plaintiff has been induced to refrain from exercising his rights."), cert. denied, 112 S. Ct. 198 (1991); Hamilton v. Komatsu Dresser Indus., Inc., 964 F.2d 600, 605 (7th Cir.) (concluding equitable tolling is based in part on "the plaintiff 's excusable ignorance of the limitations period"), cert. denied, 113 S. Ct. 324 (1992).

[12] Although most of the cases cited involve misleading correspondence or information from the EEOC, and the letter in this case came from the MDHR, we do not find that a meaningful distinction. The worksharing agreement between the EEOC and the MDHR provides that "[i]n order to facilitate the filing of charges of employment discrimination, the EEOC and the [MDHR] each designate the other as its agent for the purpose of receiving and drafting charges." See Worksharing Agreement Between Minnesota Department of Human Rights and Equal Employment Opportunity Commission for Fiscal Year 1995 at II(A); see also Worthington v. Union Pac. R.R., 948 F.2d 477, 480-81 (8th Cir. 1991) (finding the Nebraska Equal Opportunity Commission an agent of the EEOC under the relevant worksharing agreement).

Warren v. Department of the Army, 867 F.2d 1156, 1160-61 (8th Cir. 1989) (permitting equitable tolling of the statute of limitations in Title VII action in part because of misleading right-to-sue letter issued by EEOC); Early v. Bankers Life & Casualty Co., 959 F.2d 75, 81 (7th Cir. 1992) (citing misleading conduct by the EEOC as a basis for equitable tolling); Blumberg v. H.C.A. Management Co., 848 F.2d 642, 644 (5th Cir. 1988) (finding that misleading information from the EEOC may justify equitable tolling), cert. denied, 488 U.S. 1007 (1989); Martinez v. Orr, 738 F.2d 1107, 1111-12 (10th Cir. 1984) (finding equitable tolling appropriate where notice from EEOC misled pro se claimant regarding the finality of EEOC action).

Unisys urges that Anderson cannot rely on the letter from the MDHR as a basis for equitably tolling the administrative filing period because the letter does not contain any misinformation or misrepresentations, but merely fails to include all relevant information. We disagree. In Warren, a federal employee brought suit against the wrong defendant because a letter from the EEOC did not make clear the correct party to be sued. As in this case, the letter did not make any affirmative misrepresentations, but rather used ambiguous and misleading language. We are convinced that the letter Anderson received from the MDHR, like the letter Warren received from the EEOC, would easily mislead a claimant unassisted by counsel. As previously mentioned, the MDHR was acting as the agent of the EEOC in issuing the letter. We conclude the MDHR's representation that the deadline was one year would lead a reasonable person to believe that the represented deadline governed the filing of both the federal and state administrative charges. On that

basis, we find the letter sufficient to equitably toll the federal limitations period in this case."[13]

JOINDER OF ADDITIONAL PLAINTIFFS

We next consider whether the district court erred in dismissing all plaintiffs except Anderson and Nielsen for failure to file a timely suit after they received their right-to-sue letters. Anderson's amended complaint filed in June 1992 alleged for the first time that Unisys had also discriminated against several other employees on the basis of age and sought to join these other plaintiffs in a representative action under 29 U.S.C. § 216(b). The district court refused to certify the suit as a representative action, but permitted these additional plaintiffs to join as individual parties.

Later, Unisys filed a motion to dismiss all plaintiffs, except Anderson and Nielsen, on statute-of-limitations grounds because they had received right-to-sue letters from both the MDHR and EEOC, consulted an attorney, and deliberately failed to file suit within the requisite number of days after receiving their letters. Thus, Unisys claimed that both the federal and state statutes of limitations had run on all

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[13] As previously indicated, the district court found that if Anderson could show the EEOC administrative filing period should be equitably tolled, all of the other plaintiffs could take advantage of the "timely" filing of the EEOC administrative charge. See supra note 6.

of the claims except those of Anderson and Nielsen.[14] The district court refused to permit the sixth amended complaint, which joined the additional parties, to relate back to the first, except with respect to plaintiff Nielsen, because of prejudice to Unisys. On that basis, it dismissed the claims of all plaintiffs except Anderson and Nielsen. The district court reasoned that those plaintiffs who had received their right-to-sue letters and thereafter deliberately decided not to file suit within the statute of limitations should be dismissed, but that Nielsen could continue to pursue his ADEA claim. We agree with the district court that the failure of those plaintiffs to file

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[14] The Civil Rights Act of 1991, which went into effect November 21, 1991, changed the applicable statute of limitations in ADEA actions. The previous statute of limitations was two years from the date of the discriminatory conduct, or three years from that date for wilful violations. See 29 U.S.C. § 626(e) (1988) (repealed 1991); 29 U.S.C. § 255 (1982). The Civil Rights Act of 1991 repealed that statute of limitations and replaced it with one requiring that any civil action be filed within 90 days of receiving a right-to-sue letter from the EEOC. 29 U.S.C. § 626(e) (Supp. 1993). On appeal, Anderson argues the district court erred in applying the new statute of limitations and that it instead should have applied the old two or three-year statute of limitations. Appellants apparently did not raise this argument in the district court when Unisys moved to dismiss the ADEA claims of all plaintiffs except Anderson and Nielsen. See Anderson v. Unisys, No. CV 4-92-138, slip op. at 6 n.2 (October 20, 1993) ("The parties agree that the Civil Rights Act of 1991 applies to this case."). Because this argument was not raised below, we do not address it here.

suit within ninety days after the receipt of their right-to-sue letters precludes them from joining Anderson's suit. They were given an opportunity to bring suit upon the issuance of the right-to-sue letter and failed to timely do so.

Nevertheless, appellants urge the district court erred in failing to follow the Supreme Court's decision in American Pipe & Constr. Co. v. Utah, 414 U.S. 538 (1974), and claim that case should control the outcome here. In American Pipe, the Court held:

> [W]here class action status has been denied solely because of failure to demonstrate that "the class is so numerous that joinder of members is impracticable," the commencement of the original class suit tolls the running of the statute for all purported members of the class who make timely motions to intervene after the court has found the suit inappropriate for class action status.

Id. at 552-53 (quoting Fed. R. Civ. P. 23(a)). Appellants' reliance on the American Pipe rule is misplaced. In American Pipe, the Court stressed the rule was "in no way inconsistent with the functional operation of a statute of limitations" because "[w]ithin the period set by the statute of limitations, the defendants have the essential information necessary to determine both the subject matter and size of the prospective litigation . . . ." Id. at 554-55. Here, the statute of limitations had run on the claims of all the parties who had received right-to-sue letters, with the exception of Anderson, before Anderson ever purported to file on behalf of a class of similarly situated employees in June 1992. Unisys therefore

did not know it was facing multiple litigants in a representative suit until after both the state and federal statutes of limitations had run. The American Pipe rule does not operate to revive stale claims, but rather tolls the limitations period on viable claims while the trial court determines the parameters of the class in any possible class action. Thus, the district court did not err in failing to apply the American Pipe rule.

Unisys did not move the district court to dismiss Nielsen's ADEA claim on statute-of-limitations grounds, and has not suggested we do so here. It is somewhat ironic, however, that Nielsen, who did not even file an administrative charge, is permitted to continue in this action while the others have been dismissed, and we believe that result requires a brief explanation. As we already indicated, the Civil Rights Act of 1991 altered the statute of limitations in ADEA cases. See supra note 13. The new statute of limitations is ninety days from the receipt of a right-to-sue letter from the EEOC. 29 U.S.C. § 626(e) (Supp. 1993). Nielsen never received a right-to-sue letter because he did not file an administrative charge.

Our decision in Kloos v. Carter-Day Co., 799 F.2d 397, 400 (8th Cir. 1986), permitted plaintiffs who had not filed administrative charges to "piggyback" on the timely filing of an administrative charge filed by another claimant who purported to represent the interests of a class of similarly situated employees. We held "it is sufficient for one or more plaintiffs to the action to have properly filed a charge." Id. For those plaintiffs who have never filed an administrative charge and who are allowed to piggyback on the filed claim of another, we deem it reasonable to permit them to join suit

as long as the claimant on whose administrative filing they have relied timely files suit after receiving right-to-sue letters from the state and federal agencies.

Those plaintiffs who do file administrative charges, however, should be bound by the statute of limitations, which is normally stated in the right-to-sue letter. Even if those plaintiffs are piggybacking on another employee's timely administrative charge, once they file separate administrative charges, they cannot rely any further on the other claimant's actions and must timely file suit after receiving their right-to-sue letters. Thus, any claimant who files an administrative charge and receives a right-to-sue letter from the EEOC must file suit within ninety days after receiving that letter to preserve the cause of action.

STATE CLAIMS

Finally, we affirm the district court's dismissal of the state claims of Anderson and Nielsen. Anderson filed his original complaint in February 1992, but it was never served on Unisys. The first amended complaint was served on Unisys in June 1992. Under Federal Rule of Civil Procedure 3, an action is commenced upon the filing of the complaint. Under the comparable Minnesota state procedural rule, however, an action is commenced upon service of process. Minn. R. Civ. P. 3.01. If the federal rule governed, the state claims were timely filed. The district court applied the state rule, however, upon the following reasoning:

> In Walker v. Armco Steel Corp., 446 U.S. 740 (1980), the Supreme Court held that in diversity cases, if state law requires service to

> commence an action, state law, and not Federal Rule 3, governs for purposes of state statute of limitations. "The only difference between this case and Walker is that here, the plaintiffs allege both state and federal causes of action, whereas Walker was based on claims under state law and jurisdiction thus was premised solely on diversity of citizenship." Appletree Square 1 Ltd. v. W.R. Grace & Co., 815 F.Supp. 1266, 1272 (D. Minn. 1993). There is no logical reason to make a distinction on this basis. Id.

Anderson v. Unisys, No. CV 4-92-138, slip op. at 12 (October 20, 1993). We recently affirmed the case upon which the district court relied, finding "the rationale of Walker does not change 'solely because of the fortuity' that [the plaintiff] pleaded a federal claim along with state claims." Appletree Square 1, Ltd. v. W.R. Grace & Co., 29 F.3d 1283, 1286 (8th Cir. 1994) (quoting Walker v. Armco Steel Corp., 446 U.S. 740, 753 (1980)). Based on our reasoning in that case, we affirm the decision of the district court dismissing Anderson and Nielsen's state claims because under the state commencement rule, those claims were not timely filed.

CONCLUSION

The district court's entry of summary judgment in Unisys's favor as to the federal claims of Anderson and Nielsen is reversed, and the district court is directed to equitably toll the federal administrative filing period as to them. In all other respects, the judgment of the district court is affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Richard Anderson and Norris Nielsen,

Plaintiffs,

CIVIL 4-92-138

v.

MEMORANDUM AND ORDER

UNISYS Corporation d/b/a Remington Rand Univac d/b/a Sperry Univac d/b/a Sperry d/b/a Unisys d/b/a Paramax Systems,

Defendant.

Douglas P. Kempf, Kempf & Kempf, 7801 East Bush Lake Road, Suite 260, Bloomington, MN 55439-3112, for plaintiffs.

Thomas M. Sipkins, Joseph G. Schmitt, Popham, Haik, Schnobrich & Kaufman, Ltd., 3300 Piper Jaffray Tower, 222 South Ninth Street, Minneapolis, MN 55402, for defendant.

This matter is before the Court on defendant's motion for reconsideration of the Court's order of December 1, 1993, which denied defendant's motion for summary judgment. The motion for reconsideration will be granted and summary judgment will be entered in favor of defendant.

I. General Background

Plaintiff Richard Anderson was laid off from defendant Unisys Corporation on April 2, 1990. Anderson was forty-nine years old at the time. On March 25, 1991, Anderson filed administrative claims of age discrimination with both the Equal Employment Opportunity Commission (EEOC) and the Minnesota Department of Human Rights (MDHR). As a prerequisite to the maintenance of a suit under federal law, the Age Discrimination in Employment Act (ADEA) requires that administrative charges be filed within 300 days of the adverse employment action. 29 U.S.C. § 626(d). As a prerequisite to the maintenance of a suit under state law, the Minnesota Human Rights Act (MHRA) requires that administrative charges of age discrimination be filed within one year. Minn. Stat. § 363.06, subd. 3. Thus, Anderson met the administrative filing deadline for the MDHR but not the ADEA.

Anderson received a right to sue letter dated October 8, 1991, from the EEOC; he received a similar letter dated December 24, 1991, from the MDHR. On February 10, 1992, Anderson filed a pro se complaint in federal district court alleging age discrimination. That original complaint was never served upon defendant. On June 9, 1992, Anderson filed an amended complaint, prepared with the assistance of counsel, in which he alleged for the first time that a group of similarly-situated employees were discharged because of their age in violation of the ADEA, the MHRA, and Minn. Stat. § 181.81, a statute which prohibits mandatory retirement before the age of seventy. The amended complaint was served on defendant. Defendant subsequently rehired

Anderson and he returned to work on December 13, 1992. Anderson has nevertheless continued to pursue this action.

II. Plaintiff's Motion for Class Certification

In January 1993, Anderson filed a motion for class certification, seeking to invite thirteen specific additional plaintiffs who were laid off during the same time period as Anderson to join this lawsuit. On March 25, 1993, the Court issued a memorandum and order in which the Court began by addressing defendant's argument that Anderson's ADEA claim was barred for failure to file a timely administrative claim with the EEOC and thus there was no point in allowing others to join this action. The Court noted that Anderson's administrative filing was not within 300 days of his dismissal but the Court held that Anderson would be allowed to offer evidence that the administrative period was equitably tolled. Next, the Court held that if the administrative filing period was equitably tolled and thus Anderson's filing was timely, other similarly-situated putative plaintiffs who had not filed timely administrative charges could "piggy-back" their claims to Anderson's claim. The Court found that the putative plaintiffs were similarly situated because they were all laid off from the same department at Unisys during the same general time period. Finally, the Court held that it need not certify the class in order for piggy-backing to be available; rather, plaintiffs who had not filed a timely administrative charge could rely on the timely charge of Anderson in either a class action or a multiple plaintiff joint action. Therefore, the Court denied Anderson's motion for class certification but authorized putative plaintiffs to join in this action as individually-named parties.

III. Defendant's Motion to Dismiss

In response to the Court's March 25, 1993, order, several plaintiffs, who will be referred to collectively as the non-Anderson plaintiffs, joined this lawsuit. All of the non-Anderson plaintiffs, except Donald Woods, were laid off by defendant on April 2, 1990, the same day that Anderson was laid off. Woods was laid off on June 18, 1990. On April 1, 1991, a law firm representing non-Anderson plaintiffs Robert Eggan, Carl Englehorn, Peter Lowry, Timothy Wandersee, and Woods filed age discrimination charges with the EEOC and the MDHR. Because the charges with the EEOC were not filed within 300 days of April 2, 1990, but were filed within 300 days of June 18, 1990, only Woods met the administrative filing deadline for the ADEA. The EEOC issued right to sue letters dated October 8, 1991 (the same date of Anderson's EEOC letter), to Eggan and Englehorn, and issued right to sue letters dated January 31, 1992, to Wandersee, Woods, and Lowry. The MDHR issued right to sue letters dated December 24, 1991 (the same date of Anderson's MDHR letter), to Eggan, Englehorn, Lowry, and Woods. Wandersee's right to sue from MDHR was dated December 27, 1991.

The ADEA provides that a person must file a civil action within 90 days of receiving a right to sue letter from the EEOC. 29 U. S. C. § 626(e). The MHRA provides that a person must file a civil action within 45 days of receiving a right to sue letter from the MDHR. Minn. Stat. 363.14 subd. 1(a). After consultations with attorneys, Eggan, Englehorn, Lowry, Wandersee, and Woods decided not to commence judicial proceedings within these time periods. Only one non-Anderson plaintiff, Norris Nielsen, never filed

an administrative claim with either the EEOC or the MDHR and, thus, never received a right to sue letter from either agency. Moreover, like the other non-Anderson plaintiffs, Nielsen never commenced a judicial proceeding.

In August 1993, defendant moved to dismiss all non-Anderson plaintiffs except Nielsen on statute of limitations grounds. Defendant argued that because these plaintiffs had received right to sue letters, consulted an attorney, and deliberately decided not to pursue litigation before the expiration of the statute of limitations period, they should be bound by those decisions. On October 20, 1993, the Court granted defendant's motion. In reaching its conclusion that the non-Anderson plaintiffs (except Nielsen) should be dismissed, the Court determined that it was necessary to discuss the ADEA and state law claims separately. Addressing the ADEA claims, the Court wrote that:

> Piggy-backing rules apply to administrative filings, and relation back rules apply to court filings. Anderson v. Montgomery Ward & Co., 852 F.2d 1008, 1018 (7th Cir. 1988). The Court has already held that the non-Anderson plaintiffs' failure to file a timely EEOC charge is curable provided that Anderson's administrative charge was timely because of equitable tolling. The non-Anderson plaintiffs now ask the Court to also excuse their failure to file suit within ninety days of receiving their right to sue letters.
>
> Federal Rule of Civil Procedure 15(c) provides for the relation back of certain amendments to

the complaint to the date of the original pleading. Fed.R.Civ.P. 15(c). Read literally, the rule covers an amendment adding a new "claim or defense" or an amendment which "changes the party or the naming of the party against whom a claim is asserted." While the rule deals expressly only with amendments changing or adding defendants, courts have found that the rule is also intended to apply to amendments substituting or adding plaintiffs. E.g., Leachman v. Beech Aircraft Corp., 694 F.2d 1301, 1308 (D.C. Cir. 1982); Newell v. Harrison, 779 F.Supp. 388, 390-91 (E.D.La. 1991) ("A majority of federal courts hold that an amendment adding plaintiffs who assert the same claim . . . may relate back."); Stoppelman v. Owens, 580 F.Supp. 944, 946 (D.D.C. 1983); Mattson v. Cuyuna Ore Co., 24 F.R.D. 363 (D.Minn. 1959). The central underlying question which the Court must decide to determine whether the non-Anderson plaintiffs should relate back to the time of Anderson's pro se filing is whether the defendant had notice of the potentially numerous claims at the time Anderson's action was commenced and whether relation back would cause defendant undue prejudice. Paskuly v. Marshall Field & Co., 494 F.Supp. 687, 688 (N.D.Ill. 1980), aff'd, 646 F.2d 1211 (7th Cir.), cert. denied, 454 U.S. 863 (1981). Defendant clearly had some notice of these claims. All but one of the plaintiffs filed administrative charges, and plaintiff's first

amended complaint stated an intention to make claims on behalf of similarly situated individuals. The focus of the analysis then shifts to whether allowing the non-Anderson claims to proceed would cause defendant undue prejudice.

The Court finds that defendant would be significantly prejudiced if any of the non-Anderson plaintiffs (except Nielsen) are allowed a second bite at the apple. Although the fact that the amendment exposes defendant to greater damages is not sufficient prejudice to deny relation back, Charles Wright, Arthur Miller & Mary Kay Kane, 6A Federal Practice and Procedure § 1501 at 162 (1990), the general purposes of the statute of limitations would be frustrated by allowing relation back. Statutes of limitations are "intended to secure repose for defendants -- to let them go about their business, after a definite time, untroubled by fear of being sued." Village of Bellwood v. Dwivedi, 895 F.2d 1521, 1527 (7th Cir. 1990). There is no evidence that the failure of the non-Anderson plaintiffs who filed their own administrative charges to file suit within the limitations period was due to any mistake or inadvertence, or any action by defendant. Defendant emphasizes the fact that five of the non-Anderson plaintiffs received right to sue letters and deliberately decided not to file lawsuits after receiving legal advice. The Court finds this argument persuasive. See

> United States v. Kubrick, 444 U.S. 111, 123 (1979) ("A plaintiff . . . armed with the facts about the harm done to him, can protect himself by seeking advice in the medical and legal community."); Manildra Milling Corp. v. Ogilvie Mills, Inc., 746 F.Supp. 40, 42 (D.Kan. 1990) (no relation back against a new defendant because plaintiff made a "conscious decision" to leave that defendant out of the original complaint). Under all the circumstances, the Court can only conclude that the non-Anderson plaintiffs (except Nielsen) made a deliberate and considered decision not to proceed and to allow the statute of limitations to run. Accordingly, the Court will dismiss all of the non-Anderson plaintiffs, except Nielsen. While this conclusion may seem harsh, the application of the statute of limitations is almost always harsh. Courts have nevertheless consistently respected legislative policy decisions as to when a claim becomes stale. Wollman v. Gross, 637 F.2d 544, 549 (8th Cir. 1980), cert. denied, 454 U.S. 893 (1981).

Memorandum and Order at 9-11.

The Court then addressed plaintiffs' MHRA claims:

> The Court has already concluded that it would cause defendant undue prejudice to allow the non-Anderson plaintiffs, except Nielsen, to relate their ADEA claims back to the date that

Anderson filed his original complaint. The same reasoning applies to the MHRA claims. However, with respect to Anderson's and Nielsen's MHRA claims, an additional statute of limitations issue arises. Anderson filed his complaint on February 10, 1992, but did not serve defendant until June 1992. A person must bring a civil action within forty-five days of receiving a right to sue letter from the MDHR. Minn. Stat. § 363.14. Under Federal Rule of Civil Procedure 3, an action is commenced by filing a complaint. Under Minnesota Rule of Civil Procedure 3.01, an action is commenced upon service of process. The parties agree that if the Federal Rule governs Anderson's MHRA claim was timely; if the Minnesota Rule applies, his claim is time-barred.

The Court concludes that Minnesota Rule 3.01 applies and Anderson's MHRA claim is time-barred. In Walker v. Armco Steel Corp., 446 U.S. 740 (1980), the Supreme Court held that in diversity cases, if state law requires service to commence an action, state law, and not Federal Rule 3, governs for purposes of state statute of limitations. "The only difference between this case and Walker is that here, the plaintiffs allege both state and federal causes of action, whereas Walker was based on claims under state law and jurisdiction thus was premised solely on diversity of citizenship." Appletree Square 1 Ltd. v. W. R.

> Grace & Co., 815 F.Supp. 1266, 1272 (D.Minn. 1993). There is no logical reason to make a distinction on this basis. Id. The Court finds that state law rules apply. Concordia College Corp. v. W. R. Grace & Co., 999 F.2d 326, 330-31 (8th Cir. 1993); Witherspoon v. Roadway Express, Inc., 782 F.Supp. 567 (D.Kan. 1992) (state law discrimination claim dismissed as untimely but Title VII claim not dismissed). Because Anderson did not serve defendant until June 9, 1993, under Minnesota law his action under the MHRA was not commenced within forty-five days of receipt of the right to sue notice and that claim is time barred. Thus, Anderson's MHRA claim is untimely and Nelson may not relate his claim back to it.

Memorandum and Order at 11-13.

Finally, the Court addressed plaintiffs' claims under Minn. Stat. § 181.81:

> Minn. Stat. § 181.81 forbids private sector employers from adopting mandatory retirement policies for employees under the age of seventy. The statute of limitations for a claim under section 181.81 is two years. Kyllo v. Farmers Cooperative of Wanamingo, Minnesota, 723 F.Supp. 1332, 1337 (D.Minn. 1989); Minn. Stat. § 541.07(5). Defendant argues that these claims are barred by the statute of limitations. Plaintiffs offer two

> arguments. First, plaintiffs argue that the this cause of action relates back to the time the original complaint was filed and thus is timely. Second, plaintiffs argue that the Court should find that the two-year statute of limitations was equitably tolled.
>
> The statute of limitations on Anderson's section 181.81 claim expired on April 2, 1992. Anderson filed his original complaint in February 1992 but did not serve defendant until June 1992. For the reasons stated above about commencement of a state cause of action for statute of limitations purposes, the Court finds that Anderson's section 181.81 claims is time barred. Moreover, plaintiffs offer no facts in support of equitable tolling. Thus, these claims will be dismissed.

Memorandum and Order at 13. In short, after careful consideration, the Court dismissed the ADEA claims of all plaintiffs except Anderson and Nielsen, and dismissed the state law claims of all plaintiffs including Anderson and Nielsen. Plaintiffs immediately filed a motion asking the Court to reconsider the October 20, 1993, order. Plaintiffs' motion for reconsideration was denied on November 24, 1993.

IV. Defendant's Motion for Summary Judgment

As the Court's March 25, 1993, and October 20, 1993, orders make clear, the Court and the parties have understood all along that plaintiffs' claims depend on a finding of

equitable tolling. The ADEA requires employers to post "in conspicuous places upon its premises" a notice of rights under the Act. 29 U.S.C. § 627. The statutory notice may be posted at a location other than where the employee works on a daily basis if the employee actually visits the other location and has "reasonable access" to the notice. Heideman v. PFL, Inc., 904 F.2d 1262, 1266 (8th Cir. 1990), cert. denied, 111 S.Ct. 676 (1991). However, the ADEA's administrative charge filing deadline may be subject to equitable tolling if the employer fails to post the required statutory notice of rights. DeBrunner v. Midway Equip. Co., 803 F.2d 950, 952 (8th Cir. 1986). The employee has the burden of establishing that proper notice was not posted. Beshears v. Asbill, 930 F.2d 1348, 1352 (8th Cir. 1991). The employee cannot meet this burden by merely stating that he or she did not see the notice. Hrzenak v. White-Westinghouse Appliance Co., 682 F.2d 714, 719 (8th Cir. 1982). If the employee establishes that adequate notice was not posted, the burden then shifts to the employer to establish that the employee had either knowledge of his or her right not to be discriminated against on account of age, or the means of obtaining such knowledge. Beshears, 930 F.2d at 1352.

On December 1, 1993, defendant moved for summary judgment against Anderson and Nielsen on their ADEA claims, the only claims remaining in this lawsuit, on the grounds that no genuine issue of material fact existed on the issue of equitable tolling. Defendant offered two arguments. First, defendant asserted that it had offered uncontradicted evidence that notice was posted and that Anderson had "reasonable access" to that notice. Defendant presented evidence that notice was posted in the human resources office

at defendant's Unisys Eagandale Center (UEC) Building in Eagan, Minnesota. Although Anderson did not work in the UEC Building, defendant pointed out that Anderson admitted to visiting the human resources office in the UEC Building both before and after the layoff. Defendant also cited an audit of defendant's equal employment opportunity policies and practices conducted by the Office of Federal Contract Compliance Programs (OFCCP) as additional evidence of proper posting. The audit concluded that, subject to the implementation of commitments detailed in a separate letter, defendant's policies and practices were in compliance with federal law. The letter of commitment made no mention of failure to adequately comply with notice-posting requirements. Defendant argued that this evidence established that plaintiffs would be unable to meet their burden of proof on the issue whether defendant had posted adequate notice. Second, defendant argued that even if Anderson could establish that a genuine issue of fact existed on the question of the posting of adequate notice, it was nevertheless entitled to summary judgment because Anderson was generally aware at the time of his layoff of his right not to be discriminated against on the basis of age. Defendant pointed out that Anderson had admitted that he was aware at the time of his layoff that age discrimination was illegal. Defendant also argued that equitable tolling was inappropriate because the plaintiff is well-educated thus he had the means to obtain information concerning his rights.

Plaintiffs responded with several arguments. First, plaintiffs argued that defendant had waived any right to offer evidence that the statutorily required notice was posted. Plaintiffs asserted that because defendant did not raise the defense of untimely filing in either its answer or its statement

of the case, the defense had been waived. Although plaintiffs acknowledged that they were generally aware that defendant intended to present a posting defense, plaintiffs asserted that defendant's failure to present specific evidence of notice posting until recently has been calculated to prejudice plaintiffs. Second, plaintiffs argued that defendant was estopped from asserting a timeliness defense because defendant misrepresented to plaintiff that the layoffs were part of a reduction in force and this misrepresentation somehow prevented plaintiffs from discovering that the true reason for their discharge was age. Third, plaintiffs argued that the posting of notice in the UEC Building did not satisfy the statute's requirement that notice be in a conspicuous place to which plaintiff had reasonable access. Fourth, plaintiffs asserted that although Anderson was generally aware that age discrimination was illegal, he was not aware that he was a member of the class protected by the ADEA. Anderson was forty-nine years old when he was laid off and he stated that he thought that the ADEA's protections applied only to those persons fifty years or older. Finally, plaintiffs argued that not only was Anderson unaware of his rights under the ADEA, he did not have the means to obtain knowledge of those rights because he did not retain an attorney until after he filed his complaint.

At the conclusion of the hearing on December 1, 1993, the Court ruled from the bench, denying defendant's motion for summary judgment. As an initial matter, the Court found that waiver and estoppel did not bar defendant from asserting the defense that Anderson's administrative charge with the EEOC was untimely. However, the Court noted that plaintiffs could still overcome that defense if they could show that equitable tolling should apply. The Court

found that a fact question existed as to whether plaintiff had "reasonable access" to a notice of ADEA rights because, although there was undisputed evidence that defendant posted a notice of ADEA rights in the human resources office in the UEC Building, Anderson had not been to the UEC Building for at least eighteen months prior to his discharge. The Court then noted that defendant would still [sic] entitled to summary judgment on the equitable tolling issue if it could establish that Anderson had sufficient knowledge of his rights under the ADEA, or the means to obtain such knowledge. Anderson stated that he had an "imprecise understanding" of age discrimination laws and thought that they did not protect him. Second Anderson Aff. ¶ 2. Recognizing that the burden was on defendant to establish general knowledge, Beshears, 930 F.2d at 1352, the Court concluded that a fact-finder should determine whether Anderson's "imprecise understanding" of the ADEA constituted general knowledge, or whether Anderson had the means to obtain such knowledge. Accordingly, defendant's motion for summary judgment was denied.[1]

[1] There was also an issue as to whether plaintiff Nielsen had introduced sufficient evidence to establish a prima facie case. The Court found that Nielsen had introduced sufficient evidence. That determination is not challenged on defendant's motion for reconsideration.

V. Defendant's Motion for Reconsideration of Order Denying Summary Judgment

A. New Evidence

In response to the Court's December 1, 1993, ruling, defendant began searching for evidence that the statutorily required notice of ADEA rights was posted not only in the UEC Building, but also in Corporate Square D, the building in which Anderson worked. After the Court's December 1 order, defendant interviewed several guards who were occasionally stationed in the lobby of Corporate Square D.[2] Four guards, two of whom are currently employed by defendant and two of whom are former employees, have presented affidavits in which they claim to recall seeing large colorized notices at the entrances to Corporate Square D prior to the time of Anderson's layoff. Affidavit of Dan Dullum ¶ 4-5; Affidavit of Marvin Stutz ¶ 4-6; Affidavit of Ron Scritchfield ¶ 5-9; Affidavit of Ray Garcia ¶ 5-9. Defendant argues that because of this evidence, plaintiffs cannot meet their burden of proof on the issue of the absence of notice.

In response to defendant's presentation of this "new evidence," plaintiffs' attorney immediately deposed the four guards. The two former guards stated that they specifically remember seeing "Equal Opportunity is the Law" posters on

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[2] Defendant is a defense contractor and is therefore required by law to observe a number of security precautions, including restricting access to its buildings. Defendant stations security guards in the lobbies of and at the employee entrances to its buildings.

the boards near the entrances because, due to their size and color, the posters were eye-catching. Deposition of Marvin G. Stutz at 51; Deposition of Daniel J. Dullum at 12. However, the two former guards did not remember seeing several other notices which are required by law. Plaintiffs allege that this selective recollection casts doubt on the former guards' credibility. Plaintiffs also allege that the two guards who remain employed by defendant are concerned about future layoffs and thus there is reason to believe that they have offered this testimony in order to protect their jobs. However, plaintiff's legal argument in opposition to defendant's motion for reconsideration does not press these credibility and bias allegations. Rather, plaintiffs argue that because of alleged misconduct by defendant during the discovery process, the Court should enter judgment in favor of plaintiffs on the equitable tolling issue. Plaintiff also argues, for the first time, that the Court should find as a matter of law that equitable tolling is unnecessary because defendant's alleged discriminatory acts constituted a continuing violation and Anderson's administrative claim was filed within 300 days of the end of the violation period. In the alternative, plaintiffs request that the Court allow plaintiffs to depose additional witnesses to probe into the issue of why the "new evidence" on the posting of ADEA notice in Corporate Square D was not discovered earlier.

B. Summary Judgment Standard

A movant is not entitled to summary judgment unless the movant can show that no genuine issue exists as to any material fact. Fed.R.Civ.P. 56(c). In considering a summary judgment motion, a court must determine whether "there are any genuine factual issues that properly can be resolved only

by a finder of fact because they may reasonably be resolved in favor of either party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). The role of a court is not to weigh the evidence but instead to determine whether, as a matter of law, a genuine factual conflict exists. AgriStor Leasing v. Farrow, 826 F.2d 732, 734 (8th Cir. 1987). "In making this determination, the court is required to view the evidence in the light most favorable to the nonmoving party and to give that party the benefit of all reasonable inferences to be drawn from the facts." AgriStor Leasing, 826 F.2d at 734. When a motion for summary judgment is properly made and supported with affidavits or other evidence as provided in Fed.R.Civ.P. 56(c), then the nonmoving party may not merely rest upon the allegations or denials of the party's pleading, but must set forth specific facts, by affidavits or otherwise, showing that there is a genuine issue for trial. Lomar Wholesale Grocery, Inc. v. Dieter's Gourmet Foods, Inc., 824 F.2d 582, 585 (8th Cir. 1987), cert. denied, 108 S.Ct. 707 (1988). Moreover, summary judgment must be entered against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986).

C. Analysis

In response to defendant's motion for reconsideration, plaintiffs have again argued that defendant has waived the timeliness defense because it has not offered evidence in support of the defense until now and because defendant has

engaged in misconduct during the discovery process.[3] Once

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[3] In opposition to defendant's motion for summary judgment, plaintiffs also raised an estoppel argument. Plaintiffs argued that defendant should be estopped from asserting a timeliness defense because it misrepresented to plaintiffs that they were being laid off because of a reduction in force not because of their age. The Court concluded that plaintiffs' argument was without merit. In reaching that conclusion, the Court was guided by Heideman v. PFL, Inc., 904 F.2d 1262 (8th Cir. 1990), cert. denied, 111 S.Ct. 676 (1991), in which the Eighth Circuit wrote:

> The Heidemans argue that PFL affirmatively concealed from Leo Heideman the reason for this discharge because it did not tell him he was fired for being too old. We have no doubt that is so. No employer is likely to admit to the disadvantaged employee a flagrant violation of a federal law against discrimination on the basis of age, race, or gender. Whether or not an employer tell its employee the true reasons for the adverse employment decision is not the standard. Nor is it especially relevant that, as the facts show, PFL has attempted to conceal its discriminatory actions. The Heidemans have not adduced facts to show that the delayed filing was "due to the employer's concealment, misrepresentation or failure to post notice." Nielsen v. Western Elec. Co., 603 F.2d 741, 743 (8th Cir. 1979). There is nothing on the

again, the Court finds that defendant has not waived an untimely administrative filing defense. Absent unusual circumstances, an untimely administrative filing defense may be raised for the first time on a motion to dismiss or motion for summary judgment. See Sanders v. Dept. of the Army, 981 F.2d 990, 991 (8th Cir. 1992). Although plaintiffs claim to be surprised by the fact that defendant is asserting a timeliness defense, it has been clear all along that defendant would make an issue of Anderson's late administrative filing. Defendant raised the issue in its memorandum in opposition to plaintiffs' motion for class certification in January 1993. In ruling on that motion, the Court stated that "whether defendant posted notice and whether plaintiff was generally aware of his rights are disputed issues that, on this motion,

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> record to indicate that the company successfully misled Heideman or prevented him from discovering or pursuing his rights under the ADEA.

904 F.2d at 1266. Heideman makes clear that plaintiffs must offer evidence which would support a finding that their failure to pursue ADEA remedies was caused by something more than the mere fact that defendant did not admit that plaintiffs were fired because of their age. See also Glass v. IDS Financial Services, Inc., 778 F.Supp. 1029, 1047 (D.Minn. 1991) ("the proper inquiry is whether an employer successfully misled plaintiffs regarding the nature of their ADEA rights or prevented them from discovering or pursuing those rights"). Plaintiffs do not specifically reassert this estoppel argument in their memorandum in opposition to defendant's motion for reconsideration.

are construed in plaintiff's favor." March 25, 1993, Memorandum and Order at 10. Moreover, the Court's order of October 20, 1993, made clear that the merits of plaintiffs' equitable tolling argument had yet to be addressed by the Court.

The Court also rejects plaintiffs' request to strip defendant of this defense because of defendant's alleged lack of candor during the discovery process. The gist of plaintiffs' argument is that defendant has attempted to hide evidence of posting and then spring it on plaintiffs, first at the time of defendant's summary judgment motion, and now in connection with this motion for reconsideration. The Court rejects this request for two main reasons. First, plaintiffs apparently brought several motions to compel discovery, but eventually withdrew each motion after the disputes were resolved to their satisfaction. While there is much evidence that the parties did not fully cooperate during discovery, there is no evidence of a pattern of bad faith. Second, the Court cannot discern any motive for defendant to hide evidence of posting in Corporate Square D or elsewhere. While it appears that defendant was not overly diligent in determining all locations where notice was posted, this is not grounds for excluding evidence. In addition, plaintiffs have had the opportunity to depose the new witnesses and probe into the sources of the witnesses' knowledge. The Court is aware that plaintiffs have expended substantial time and resources pursuing this litigation which might have been spared had defendant presented this evidence earlier. However, there is no legal justification to bar otherwise admissible and highly relevant evidence just because the opposing party has invested much in the litigation.

Accordingly, the Court will consider defendant's "new evidence."

The Court concludes that, based on defendant's "new evidence" of postings in Corporate Square D, the building in which Anderson worked, it is clear that plaintiffs will not be able to prove that defendant failed to comply with statutory notice requirements. Beshears v. Asbill, 930 F.2d 1348, 1352 (8th Cir. 1991). The notice was posted "upon the premises" which Anderson worked, 29 U.S.C. § 627, and thus he clearly had "reasonable access" to that notice. Heideman v. PFL, Inc., 904 F.2d 1262, 1266 (8th Cir. 1990), cert. denied, 111 S.Ct. 676 (1991). Anderson's claim that he never saw the notice does not create a material factual dispute. Hrzenak v. White-Westinghouse Appliance Co., 682 F.2d 714, 719 (8th Cir. 1982). Moreover, plaintiff may not create a fact question merely by pointing out that witnesses may be biased or their memories may be faulty.

The Court notes that the "new evidence" is not the only evidence that defendant posted the required notice in a location to which Anderson had "reasonable access." The OFCCP audited defendant's employment policies and practices and found them to be satisfactory. The form on which OFCCP auditors prepare their reports specifically provides that the auditor must "VERIFY THAT CONTRACTOR HAS . . . POSTED NOTICE OF ITS OBLIGATIONS/EEO POSTERS IN CONSPICUOUS PLACES." Affidavit of Thomas Sipkins Exh. E ¶ 2410. The OFCCP's 1987 report specifically listed five problems that defendant should respond to; notice posting was not one of those problems. See Affidavit of Ivo Franulic Exh. B. Courts generally consider this type of evidence to be

persuasive. For example, in Byers v. Follmer Trucking Co., 763 F.2d 599 (3rd Cir. 1985), there was no definitive testimony or documentary evidence that notice had been posted. However, the defendant introduced evidence that it routinely conducted self-inspections to determine whether it was in compliance with federal employment laws. The inspector was responsible, among other things, for insuring that all required notices were properly displayed. At no time had an inspector found the posting notice to be lacking. The court held that the inspection procedure supported an inference that the defendant had complied with the ADEA posting requirements. In the case at bar, defendant has been certified by the OFCCP to be in compliance with federal employment policies. While at the time of defendant's motion for summary judgment the Court did not consider the OFCCP audit to be sufficient evidence, without more, to decide the equitable tolling issue, when this evidence is combined with the "new evidence" defendant has offered, it convinces the Court that no reasonable jury could find that Anderson did not have "reasonable access" to a notice of his rights under the ADEA. Therefore, Anderson's equitable tolling claim fails as a matter of law. See Morse v. Daily Press, Inc., 826 F.2d 1351, 1353 (4th Cir.), cert. denied, 108 S.Ct. 455 (1987) (notice adequate as a matter of law); Berry v. Joseph E. Seagram & Sons, Inc., 744 F.Supp. 214, 217 (C.D.Cal. 1990) (same).

The Court also rejects plaintiffs' argument, which is raised now for the first time, that defendant's layoff practices amounted to a continuing violation of the ADEA and thus a finding of equitable tolling is not necessary. "The continuing violation theory is generally inapplicable to discharge cases, since a discharge is perhaps the clearest example of a single,

rather than continuing, event." 2 Arthur Larson and Lex K. Larson, Employment Discrimination, § 48.13(g)(1) at 9A-70 (1993). "The continuing violation doctrine does not exist to give a second chance to an employee who allowed a legitimate [ADEA] claim to lapse." Roberts v. Gadsden, 835 F.2d 793, 800 (11th Cir 1988).

Finally, the Court will not grant plaintiffs' request to depose additional witnesses to probe into why evidence of the posting of notice in Corporate Square D was not discovered earlier. Plaintiffs give no indication what they hope to learn during these additional depositions. See Fed.R.Civ.P. 56(f). The Court concludes that it is appropriate to enter judgment at this time.

Accordingly, based on the foregoing, and upon all the files, records and proceedings herein,

IT IS ORDERED that:

1. defendant's motion for reconsideration is granted; and

2. defendant's motion for summary judgment is granted.

LET JUDGMENT BE ENTERED ACCORDINGLY.

_____

Judge Harry H. MacLaughlin
United States District Court

DATED: _____, 1995

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Richard Anderson, Robert Eggan, Carl Englehorn, Norris Nielsen, Timothy Wandersee, Donald Woods, Peter Lowry,

Plaintiffs,

CIVIL 4-92-138

v.

MEMORANDUM AND ORDER

UNISYS Corporation d/b/a Remington Rand Univac d/b/a Sperry Univac d/b/a Sperry d/b/a Unisys d/b/a Paramax Systems,

Defendant.

Douglas P. Kempf, Kempf & Kempf, 7801 East Bush Lake Road, Suite 260, Bloomington, MN 55439-3112, for plaintiffs.

Thomas M. Sipkins, Joseph G. Schmitt, Popham, Haik, Schnobrich, & Kaufman, Ltd., 3300 Piper Jaffray Tower, 222 South Ninth Street, Minneapolis, MN 55402, for defendant.

This matter is before the Court on defendant's motion to dismiss several plaintiffs and defendant's motion to bifurcate issues for trial, stay discovery, and extend the pretrial schedule. Defendant's motion to dismiss several plaintiffs will be granted. Defendant's motion to bifurcate issues for trial, stay discovery, and extend the pretrial schedule will be denied.

FACTS

The following facts are relevant to these motions. This age discrimination action was commenced by plaintiff Richard Anderson. Anderson was laid off from defendant Unisys Corporation on April 2, 1990. As a prerequisite to the maintenance of a suit under federal law, the Age Discrimination in Employment Act (ADEA) requires that administrative charges be filed within 300 days of the adverse employment action. 29 U.S.C. § 626(d). As a prerequisite to the maintenance of a suit under state law, the Minnesota Human Rights Act (MHRA) requires that administrative charges of age discrimination be filed within one year. Minn. Stat. § 363.06, subd. 3. Anderson filed an administrative charge of age discrimination with the Minnesota Department of Human Rights (MDHR) and the Equal Employment Opportunity Commission (EEOC) on March 25, 1991. Thus, Anderson met the administrative filing deadline for the MDHR but not the ADEA.

On December 24, 1991, the MDHR sent Anderson a right to sue letter informing him that he had forty-five days to file suit under state law. Anderson received that letter on December 26. Anderson apparently received his right to sue

letter from the EEOC on January 31, 1992.[1] On February 10, 1992, Anderson filed a pro se complaint in federal district court alleging age discrimination. That original complaint was never served upon defendant. On June 9, 1992, Anderson filed an amended complaint, prepared with the assistance of counsel, in which he alleged for the first time that a group of similarly-situated employees were discharged because of their age in violation of the ADEA, the MHRA, and Minn. Stat. § 181.81, a statute governing mandatory retirement. The amended complaint was served on defendant. Defendant subsequently rehired Anderson and he returned to Unisys on December 13, 1992. Nevertheless, Anderson has continued to pursue this action.

In January 1993, Anderson filed a motion for class certification, seeking to invite thirteen specific additional plaintiffs who were laid off during the same time period as Anderson to join this lawsuit. On March 25, 1993, the Court issued a memorandum and order declining to certify the class but authorizing those thirteen putative plaintiffs to join the suit as individually-named parties. Addressing defendant's argument that Anderson's ADEA claim was time barred for failure to file a timely administrative claim, the Court noted that Anderson's administrative filing was not within 300 days of his dismissal but the Court concluded that Anderson may

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[1] Anderson's right to sue letter does not appear to be part of the record before the Court. In connection with this motion, defendant has provided a copy of plaintiff Timothy Wandersee's right to sue letter from the EEOC. Def.'s Hem. Supp. Mot. Partial Summ. J. Exh. A. Wandersee's letter is dated January 31, 1992.

be able to show that the administrative period was equitably tolled. Next, the Court held that if the administrative statute of limitations was equitably tolled and thus Anderson's filing was timely, other similarly-situated putative plaintiffs who had not filed timely administrative charges could "piggy-back" their claims to plaintiff's claim. The Court found that the putative plaintiffs were similarly situated because they were all laid off from the same department at Unisys during the same general time period. Finally, the Court held that it need not certify the class for piggy-backing to be available; rather, plaintiffs who have not filed a timely administrative charge can rely on the timely charge of another plaintiff in a class action or in a multiple plaintiff joint action. Therefore, the Court denied Anderson's motion for class certification but authorized putative plaintiffs to join this action as individually-named parties.

In response to the Court's order, several plaintiffs, who will be referred to collectively as the non-Anderson plaintiffs, joined this lawsuit. All of the plaintiffs who have joined this action, except Donald Woods, were laid off by defendant on April 2, 1990, the same day that Anderson was laid off. Woods was laid off on June 18, 1990. On April 1, 1991, a law firm representing plaintiffs Robert Eggan, Carl Englehorn, Peter Lowry, Timothy Wandersee, and Woods filed age discrimination charges with the EEOC and the MDHR. Thus, these non-Anderson plaintiffs met the administrative filing deadline of the MDHR (one year), but only Woods's EEOC administrative claim was timely under the ADEA (300 days). Only one non-Anderson plaintiff, Norris Nielsen, has never filed an administrative claim with either the EEOC or the MDHR.

In separate letters dated December 24, 1991, the MDHR notified Eggan, Englehorn, Lowry, and Woods that no further action would be taken on their claims and that they had forty-five days in which to institute litigation under state law. In a letter dated December 27, 1991, the MDHR provided Wandersee with the same information. The EEOC, in letters dated January 31, 1992, informed these five plaintiffs that the EEOC would take no further action and they were free to bring an action in federal court under the ADEA. After consultations with attorneys, all five plaintiffs decided not to commence judicial proceedings.

Defendant has now moved to dismiss Nielsen's section 181.81 claim, and to dismiss all claims by the other five non-Anderson plaintiffs. Defendant also seeks bifurcation of the trial, a stay of discovery, and an extension of the pretrial schedule.

DISCUSSION

I. Motions to Dismiss

In reviewing a motion to dismiss for failure to state a claim the Court presumes all factual allegations to be true and all reasonable inferences from those allegations are construed in favor of the non-moving party. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974); Palmer v. Tracor, Inc., 856 F.2d 1131, 1132 (8th Cir. 1988). The appropriate inquiry is not whether plaintiff will ultimately prevail but whether he will be allowed to introduce evidence to support his claims. Scheuer, 416 U.S. at 236. Because dismissal on the pleadings is an extreme remedy it is not favored by the courts and is employed only when "it appears beyond doubt that the

plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957) (footnote omitted). Robinson v. MFA Mutual Insurance Co., 629 F.2d 497, 500 (8th Cir. 1980). See also Palmer, 856 F.2d at 1132.

A. Age Discrimination Claims

The Civil Rights Act of 1991 "drastically altered the statute of limitations applicable to ADEA claims." McConnell v. Thomson Newspapers, Inc., 802 F.Supp. 1484, 1493 (E.D.Tex. 1992).[2] Until 1991, the ADEA provided that a plaintiff had 300-days to file an administrative charge and two years to commence a civil action (three years if the violation was willful), both time periods beginning to run as of the date of the adverse employment action. See Beshears v. Asbill, 930 F.2d 1348, 1356 n.12 (8th Cir. 1991). In the Civil Rights Act of 1991, Congress repealed the two-year statute of limitations for filing a civil action. However, a plaintiff still must bring an ADEA civil lawsuit within ninety days of receiving a right to sue letter from the EEOC. 29 U.S.C. § 626(e) (West Supp. 1993); McConnell, 802 F.Supp. at 1493.

The administrative filing requirement and statute of limitations under the MHRA differ from the administrative filing requirement and statute of limitations under the ADEA. Under the MHRA, a person has one year to file an

[2] The parties agree that the Civil Rights Act of 1991 applies to this case. The Civil Rights Act of 1991 became effective November 21, 1991.

administrative claim and forty-five days after a right to sue letter is issued by the MDHR to commence a judicial proceeding. Minn. Stat. § 363.06, subd. 3; § 363.14. All of the plaintiffs in this action, except Nielsen, filed administrative claims with the MDHR within one year of being laid off. However, none of the non-Anderson plaintiffs that filed administrative claims commenced a judicial proceeding within forty-five days of receiving a right to sue letter for the MDHR.

The Court's March 25, 1993, order was limited to the question whether the putative plaintiffs would be permitted to piggy-back untimely EEOC charges onto Anderson's EEOC charge, which, again, is timely only if equitable tolling is found to apply. In connection with the motion for class certification, the parties did not address, and the Court did not consider, whether the putative plaintiffs' claims might be barred by the statute of limitations.

Defendant argues that only Nielsen, who filed neither an administrative charge nor a lawsuit, should be allowed to depend on Anderson's filings. Defendant argues that because the other five non-Anderson plaintiffs filed administrative charges, they should have filed suit within ninety days of receiving right to sue letters from the EEOC. Defendant points out that those five plaintiffs were all represented by counsel at the time they received their right to sue letters and they made informed and deliberate decisions, after consultations with counsel, not to proceed in court. Defendant argues that allowing these plaintiffs to join this action would give them a second bite at the apple; it would revive rights these plaintiffs deliberately waived over a year

before they were invited to join this action through the Court's March 25, 1993 order.

Plaintiffs argue that if the Court allows Nielsen's claim to proceed but dismisses the other five non-Anderson plaintiffs, the Court will be punishing those who specifically put defendant on notice that they felt they had been victims of discrimination. Plaintiffs also argue that they were given poor legal advice after they received their right to sue letters. Based upon these facts, plaintiffs assert that the Court should find that the sixth amended complaint, through which the non-Anderson plaintiffs joined this lawsuit, relates back to the original complaint that Anderson filed pro se on February 10, 1992, and therefore their age discrimination claims are not barred by the statute of limitations.

Defendant filed a reply memorandum to specifically address plaintiffs' relation back argument. Defendant addresses plaintiffs' ADEA and state law claims separately. Relying on authorities from outside this circuit, defendant argues that the non-Anderson's ADEA claims could relate back to Anderson's filing only if there was evidence of mistake or inadvertence. Defendant asserts that relation back cannot apply here for the five plaintiffs who received right to sue letters and made a conscious decision not to proceed. Defendant also argues the state law claims cannot relate back because, under the Minnesota Rules of Civil Procedure, an action is not commenced until the defendant is served and in this case defendant was not served until June 9, 1992. Thus, defendant argues that even Anderson's claim under the MHRA is time barred. It is necessary to discuss the ADEA and MHRA claims separately.

1. ADEA

Piggy-backing rules apply to administrative filings, and relation back rules apply to court filings. Anderson v. Montgomery Ward & Co., 852 F.2d 1008, 1018 (7th Cir. 1988). The Court has already held that the non-Anderson plaintiffs' failure to file a timely EEOC charge is curable provided that Anderson's administrative charge was timely because of equitable tolling. The non-Anderson plaintiffs now ask the Court to also excuse their failure to file suit within ninety days of receiving their right to sue letters.

Federal Rule of Civil Procedure 15(c) provides for the relation back of certain amendments to the complaint to the date of the original pleading. Fed.R.Civ.P. 15(c). Read literally, the rule covers an amendment adding a new "claim or defense" or an amendment which "changes the party or the naming of the party against whom a claim is asserted." While the rule deals expressly only with amendments changing or adding defendants, courts have found that the rule is also intended to apply to amendments substituting or adding plaintiffs. E.g., Leachman v. Beech Aircraft Corp., 694 F.2d 1301, 1308 (D.C.Cir. 1982); Newell v. Harrison, 779 F.Supp. 388, 390-91 (E.D.La. 1991) ("A majority of federal courts hold that an amendment adding plaintiffs who assert the same claim . . . may relate back."); Stoppelman v. Owens, 580 F.Supp. 944, 946 (D.D.C. 1983); Mattson v. Cuyuna Ore Co., 24 F.R.D. 363 (D.Minn. 1959). The central underlying question which the Court must decide to determine whether the non-Anderson plaintiffs should relate back to the time of Anderson's pro se filing is whether the defendant had notice of the potentially numerous claims at the time Anderson's action was commenced and whether

relation back would cause defendant undue prejudice. Paskuly v. Marshall Field & Co., 494 F.Supp. 687, 688 (N.D. Ill. 1980), aff'd, 646 F.2d 1211 (7th Cir.), cert. denied, 454 U.S. 863 (1981). Defendant clearly had some notice of these claims. All but one of the plaintiffs filed administrative charges, and plaintiff's first amended complaint stated an intention to make claims on behalf of similarly situated individuals. The focus of the analysis then shifts to whether allowing the non-Anderson claims to proceed would cause defendant undue prejudice.

The Court finds that defendant would be significantly prejudiced if any of the non-Anderson plaintiffs (except Nielsen) are allowed a second bite at the apple. Although the fact that the amendment exposes defendant to greater damages is not sufficient prejudice to deny relation back, Charles Wright, Arthur Miller & Mary Kay Kane, 6A Federal Practice and Procedure § 1501 at 162 (1990), the general purposes of the statute of limitations would be frustrated by allowing relation back. Statutes of limitations are "intended to secure repose for defendants -- to let them go about their business, after a definite time, untroubled by fear of being sued." Village of Bellwood v. Dwivedi, 895 F.2d 1521, 1527 (7th Cir. 1990). There is no evidence that the failure of the non-Anderson plaintiffs who filed their own administrative charges to file suit within the limitations period was due to any mistake or inadvertence, or any action by defendant. Defendant emphasizes the fact that five of the non-Anderson plaintiffs received right to sue letters and deliberately decided not to file lawsuits after receiving legal advice. The Court finds this argument persuasive. See United States v. Xubrick, 444 U.S. 111, 123 (1979) ("A plaintiff . . . armed with the facts about the harm done to him, can protect

himself by seeking advice in the medical and legal community."); Manildra Milling Corp. v. Ogilvie Mills, Inc., 746 F.Supp. 40, 42 (D.Kan. 1990) (no relation back against a new defendant because plaintiff made a "conscious decision" to leave that defendant out of the original complaint). Under all the circumstances, the Court can only conclude that the non-Anderson plaintiffs (except Nielsen) made a deliberate and considered decision not to proceed and to allow the statute of limitations to run. Accordingly, the Court will dismiss all of the non-Anderson plaintiffs, except Nielsen. While this conclusion may seem harsh, the application of the statute of limitations is almost always harsh. Courts have nevertheless consistently respected legislative policy decisions as to when a claim becomes stale. Wollman v. Gross, 637 F.2d 544, 549 (8th Cir. 1980), cert. denied, 454 U.S. 893 (1981).

2. MHRA

The Court has already concluded that it would cause defendant undue prejudice to allow the non-Anderson plaintiffs, except Nielsen, to relate their ADEA claims back to the date that Anderson filed his original complaint. The same reasoning applies to the MHRA claims. However, with respect to Anderson's and Nielsen's MHRA claims, an additional statute of limitations issue arises. Anderson filed his complaint on February 10, 1992, but did not serve defendant until June 1992. A person must bring a civil action within forty-five days of receiving a right to sue letter from the MDHR. Minn. Stat. § 363.14. Under Federal Rule of Civil Procedure 3, an action is commenced by filing a complaint. Under Minnesota Rule of Civil Procedure 3.01, an action is commenced upon service of process. The parties

agree that if the Federal Rule governs Anderson's MHRA claim was timely; if the Minnesota Rule applies, his claim is time-barred.

The Court concludes that Minnesota Rule 3.01 applies and Anderson's MHRA claim time-barred. In Walker v. Armco Steel Corp., 446 U.S. 740 (1980), the Supreme Court held that in diversity cases, if state law requires service to commence an action, state law, and not Federal Rule 3, governs for purposes of state statute of limitations. "The only difference between this case and Walker is that here, the Plaintiffs allege both state and federal causes of action, whereas Walker was based on claims under state law and jurisdiction thus was premised solely on diversity of citizenship." Appletree Square 1 Ltd. v. W. R. Grace & Co., 815 F.Supp. 1266, 1272 (D.Minn. 1993). There is no logical reason to make a distinction on this basis. Id. The Court finds that state law rules apply. Concordia College Corp. v. W. R. Grace & Co., 999 F.2d 326, 330-31 (8th Cir. 1993); Witherspoon v. Roadway Express, Inc., 782 F.Supp. 567 (D.Kan. 1992) (state law discrimination claim dismissed as untimely but Title VII claim not dismissed). Because Anderson did not serve defendant until June 9, 1993, under Minnesota law his action under the MHRA was not commenced within forty-five days of receipt of the right to sue notice and that claim is time barred. Thus, Anderson's MHRA claim is untimely and Nelson may not relate his claim back to it.

B. Minn. Stat. § 181.81

Minn. Stat. § 181.81 forbids private sector employers from adopting mandatory retirement policies for employees

under the age of seventy. The statute of limitations for a claim under section 181.81 is two years. Kyllo v. Farmers Cooperative of Wanamingo Minnesota, 723 F.Supp. 1332, 1337 (D.Minn. 1989); Minn. Stat. § 541.07(5). Defendant argues that these claims are barred by the statute of limitations. Plaintiffs offer two arguments. First, plaintiffs argue that the this cause of action relates back to the time the original complaint was filed and thus is timely. Second, plaintiffs argue that the Court should find that the two-year statute of limitations was equitably tolled.

The statute of limitations on Anderson's section 181.81 claim expired on April 2, 1992. Anderson filed his original complaint in February 1992 but did not serve defendant until June 1992. For the reasons stated above about commencement of a state cause of action for statute of limitations purposes, the Court finds that Anderson's section 181.81 claims is time barred. Moreover, plaintiffs offer no facts in support of equitable tolling. Thus, these claims will be dismissed.

II. Motions to Bifurcate Stay Discovery, and Extend Pretrial Schedule

Defendant seeks a bifurcation of the issues for trial. Defendant argues that the issue of whether Anderson's need to file a timely administrative claim with the EEOC was equitably tolled should be answered, by a fact finder first. The Court may order a separate trial on any issue if a separate trial will be conducive to expedition and economy. Fed.R.Civ.P. 42(b). The Court has broad discretion on whether to order a separate trial on a particular issue. Beeck v. Aquaslide 'N' Dive Corp., 562 F.2d 537, 541 (8th Cir.

1977). "In exercising discretion, district courts should consider the preservation of constitutional rights, clarity, judicial economy, the likelihood of inconsistent results and possibilities for confusion." O'Dell v. Hercules, Inc., 904 F.2d 1194, 1202 (8th Cir.1990). After weighing these factors, the Court has decided against bifurcation. Thus, defendant's motion will be denied.

Accordingly, based on the foregoing, and upon all the files, records and proceedings herein,

IT IS ORDERED that:

1. defendant's motion to dismiss Robert Eggan, Carl Englehorn, Peter Lowry, Timothy Wandersee, and Donald Woods is granted;

2. all state law claims are dismissed as barred by the statute of limitations; and

3. defendant's motion to bifurcate the issues for trial, stay discovery, and extend the pretrial schedule is denied.

Judge Harry H. MacLaughlin
United States District Court

DATED: April ____, 1995